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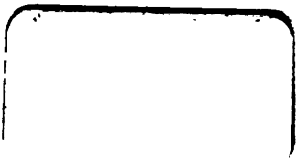

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CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES,

FOR THE

SEVENTH JUDICIAL CIRCUIT.

BY

JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

VOL. I.—1851-1867.

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JUDGES

WHOSE OPINIONS ARE REPORTED IN THIS VOLUME.

HON. JOHN McLEAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.
Allotted to the Seventh Circuit. Appointed March 7th, 1829.
Deceased, April 4, 1861.

HON. DAVID DAVIS,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.
Allotted to the Seventh Circuit. Appointed December 8, 1862.

HON. THOMAS DRUMMOND,
APPOINTED DISTRICT JUDGE FOR THE DISTRICT OF ILLINOIS, FEBRUARY 19, 1850.
District Judge for the Northern District from March 3, 1855, when the District was divided by Act of Congress, until January 8, 1870. Commissioned Circuit Judge for the Seventh Circuit, December 22, 1869.

HON. ANDREW G. MILLER,
DISTRICT JUDGE FOR THE DISTRICT OF WISCONSIN.
Appointed June 12, 1848.
District Judge for the Eastern District, since the division of the District by Act of Congress, July 9, 1870.

HON. SAMUEL H. TREAT,
DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.
Appointed March 3, 1855.

HON. ELISHA M. HUNTINGTON,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed May 20, 1842; Deceased, October 26, 1862.

HON. DAVID McDONALD,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed December 13, 1864; Deceased August 25, 1869.

32034

PREFACE.

This volume, the work of the early and late hours of a practicing lawyer, is the first of a series which is designed to include the leading decisions of the United States Circuit and District Courts for the Seventh Judicial Circuit since the time of McLean's Reports, and to form with them a continuous and harmonious series. The opinions after passing through the reporter's hands have been revised by the respective judges. Not originally designed for publication, and in many cases laid aside as soon as the interest of a *nisi prius* case had passed away, the difficulties of properly preparing them and the necessary statements of facts have been greater than any one could have expected,—far greater than the reporter imagined when he undertook this task.

The reporters of the State Courts are furnished with printed records, statements of facts and briefs, and opinions prepared with reference to publication,—an advantage which no one can appreciate until he has collated loose manuscript, slips of newspapers, old law periodicals, resurrected briefs and memoranda, and dusty court files. Where facts and figures have slipped from the memory of court, counsel and litigants, it is extremely difficult to prepare and present the principles in a manner satisfactory to the profession or author; nor is it possible to do full justice to the judges whose opinions are thus presented to the public.

That since the death of the late Judge McLean, whose valuable series of reports bears his name, there should have been no regular reports of the decisions in this circuit, comprising three large and rapidly growing states, before whose tribunals are continually arising cases involving important questions and large commercial and landed interests, has long been a sur-

prise and regret to the members of the profession. Encouraged by many of his professional brethren to collect and arrange these decisions, the reporter only hopes that if some of the cases may appear incomplete, they will remember the circumstances under which this series has been undertaken and prepared.

A number of cases here reported have been carried to the Supreme Court, as will appear by the notes added thereto; but the opinions below are published here, either as containing a fuller discussion of the principles involved, or because the case was decided in the upper court on some point of practice, or question not considered below. In some cases where the decision below is affirmed without discussion of principles or authorities, the opinion of the Circuit or District Judge acquires, so to speak, the authority of a Supreme Court decision.

By no means all the opinions which have come to the hands of the reporter are published in this series. During the period covered by the present volume, many questions of great interest and importance at the time have become dead issues, and the value of many decisions as contributions to the permanent body of judicial decision has passed away. Many able, elaborate, and well reasoned decisions on questions connected with the Fugitive Slave Law, special state statutes, and the varied and exciting questions arising out of the late civil war have been laid aside, even though some of them were both interesting in themselves and by reason of the circumstances under which they were delivered, and formed, perhaps, a legitimate portion of the judicial history of the North-West.

The executors of the late lamented Judge McLean, Associate Justice of the Supreme Court of the United States, have kindly furnished to the reporter all his unpublished manuscript, and many of his opinions will be found in this volume.

The opinions of the late Judge McDonald, of Indiana, have also been delivered to the reporter to be incorporated into this series, where they naturally belong. They will form a large part of the third volume.

After the materials had been collected, and the work of revising and arranging commenced, the whole narrowly escaped

destruction in the great Chicago fire, and the entire destruction of all the law libraries, both public and private, necessitated a long delay,—it being indispensable that the numerous authorities cited by court and counsel be verified and compared.

The second volume is now in the printer's hands, and the third and fourth will follow as rapidly as is consistent with accuracy.

To the respective Judges, the clerks of the several courts, to the Hon. S. S. Fisher, late United States Patent Commissioner, and to many lawyers in this and other cities, the reporter is under obligations for opinions and information.

It is hoped that the notes added to many of the cases will be found convenient to the practicing lawyer, and if this series shall meet the approval of his professional brethren, the reporter will feel that his labors of love have been amply rewarded, and that he has discharged some portion of that duty which, according to Lord Bacon, every man owes to his profession. J. H. B.

Chicago, August 1, 1873.

OBITUARY.

Honorable John McLean, Associate Justice of the Supreme Court of the United States, whose opinions form a large part of this volume, and of whose reports this series is a continuation, died at Cincinnati on the 4th day of April, 1861, at the age of seventy-six years, being at that time the Senior Associate Justice of that Court.

Judge McLean commenced the practice of the law in 1807, at Lebanon, in Warren county, Ohio, and five years afterwards was elected to Congress in his district, which, at that time, included the city of Cincinnati. In 1814, he was, by the unanimous vote of his district, re-elected to Congress, which position he resigned to accept a place in the Supreme Court of Ohio, to which he had been elected by the Legislature of that state. He remained on the Supreme Bench of Ohio till 1822, when he was appointed Commissioner of the general land office by President Monroe, and in the succeeding year he became Postmaster General. On the 7th of March, 1829, he was appointed by President Jackson one of the Justices of the Supreme Court of the United States, and at the January Term, 1830, entered upon the duties of that office, which he continued to discharge for more than thirty years, and until the time of his death.

The decisions of Judge McLean in the Supreme Court are reported in Peters' Reports, commencing with the third volume, and in the twenty-four volumes of Howard. His opinions on the circuit are found in the six volumes of reports which bear his name, and are concluded in the present volume.

At a meeting of the members of the bar and officers of the Supreme Court of the United States, held in the Supreme Court Room, December 2d, 1861, Richard S. Coxe, Esq., on

behalf of the committee appointed for that purpose, submitted the following

RESOLUTIONS:

1. That the members of this bar and the officers of the court entertain a profound sense of the loss which, in common with the entire nation, they have sustained in the death of the late Mr. Justice McLean, so long known to the community, and in an especial manner to the profession, for his exalted legal accomplishments, the purity of his private character, and the eminent ability with which he discharged the duties of the high offices, judicial, administrative, and legislative, with which his name has been so long and honorably associated.

2. That we will wear the accustomed badge of mourning during the present term of the court.

3. That the chairman and secretary of this meeting transmit a copy of these proceedings to the family of the deceased, communicating, at the same time, the deep and sincere sympathy felt by its members in the affliction with which they have been visited by a wise and merciful Providence.

4. That the Honorable the Attorney General be respectfully solicited to present these proceedings to the Supreme Court, now in session, and to ask that they may be entered on the minutes of the court.

At the opening of the Supreme Court on the following day, Mr. Bates, the Attorney General, presented to the court the proceedings and resolutions of the meeting and moved that they be entered on the minutes of the court, addressing the court, as follows:

May it please your Honors:

I appear before you now not on my own motion, but at the request and by the authority of my brethren of this bar, who have desired me to say to you, in their behalf, a few words expressive of their feelings. And it is with an emotion of sadness, bordering upon melancholy, that I find myself constrained by circumstances to mark my first official appearance in this high court with the repulsive prestige of a bearer of bad news.

For the heart of man will sympathize with surrounding facts, and will, often unconsciously, associate ugliness and vice with the messengers of evil, and will on the contrary, imimpute beauty and goodness to the agents and instruments of its pleasure. This is a sentiment known of old as a truth rooted in the human heart. "How beautiful," exclaims the holy prophet, "how beautiful, upon the mountains, are the feet of Him that bringeth good tidings that publisheth peace!" Oh! that to-day it were my delightful office to bring you good tidings, and to publish to you peace.

But, unhappily, it is not so. Since the first organization of this court, no term has yet been held under circumstances so gloomy and sorrowful. I look up to that honored bench and behold vacant seats. Even this august tribunal, the co-equal partner in the government of a great nation, the revered dispenser of our country's justice, shares with us in feeling the common sorrow, and suffers in the common calamity. It is shorn of its fair proportions, and weakened and diminished in its strength and beauty, by the present loss of one entire third of its component members. And where are the wise, learned, and just men who used to fill those seats? Gone from this theater of their fame and usefulness, while all of us remember them with respect and gratitude, and mourn the loss of their valuable services. Two of them have been peacefully gathered to their fathers, and have left their fame safe and unchangeable, beyond the reach of malice, and secure against accident, embalmed in history, and hallowed by the grave. And one of them in the ripe vigor of his manhood, and in the pride of a noble and highly cultivated mind, has been swept away from his high position by the turbulent waves of faction and civil war.

And this is not all. Your lawful jurisdiction is practically restrained; your just power is diminished, and into a large portion of our country, your writ does not run; and your beneficent authority to administer justice according to law, is for the present, successfully denied and resisted.

I look abroad over the country and behold a ghastly spectacle; a great nation, lately united, prosperous, and happy, and

buoyant with hopes of future glory torn into warring fragments; and a land once beautiful and rich in the flowers and fruits of peaceful culture, stained with blood and blackened with fire. In all that wide space from the Potomac to the Rio Grande, and from the Atlantic to the Missouri, the still small voice of legal justice is drowned by the incessant roll of the drum, and the deafening thunder of artillery. To that extent your just and lawful power is practically annulled, for the laws are silent amidst arms. But let us rejoice in the hope that these calamities are only for a season; that the same Almighty hand which sustained our fathers in their arduous struggle to establish the glorious Constitution which this court has so long and so wisely administered, will not be withdrawn from their children in a struggle no less arduous to maintain it. Now, indeed, we are overshadowed with a dark cloud, broad and gloomy as a nation's pall; but, thanks be to God, the eye of faith and patriotism can discern the bow of promise set in that cloud, spanning the gloom with its bright arch, to foreshadow the coming of a day of sunshine and calm, and to justify our hope of a speedy restoration of peace, and order, and law.

This much, may it please the court, I have ventured to say as what seemed to me a fitting preliminary to the discharge of the duty, imposed upon me by my brethren of the bar. Of course all the members of the court know the fact that since the close of the last term, their old and honored associate, Mr. Justice McLean, has departed this life, for all men take sorrowful notice when "a prince and a great man has fallen in Israel." But the members of the bar, in pursuance of a worthy custom, long established, and stimulated, no doubt, by their personal reverence for the virtues and the learning of the departed Judge, have held a meeting and passed a series of resolutions, which they have done me the honor to confide to me, with the request that I would present them here and ask that they may be entered upon the minutes of the court as a memorial of their profound veneration for the dead, and for the high tribunal of which he was so long a worthy member. I shall not take the risk of marring the strength or beauty of

the resolutions by attempting to recite them, or to comment upon them. Let them speak for themselves, for they speak well.

But I believe it is the custom here and I hope it will not be unseemly in me to say a few words of my own about that virtuous man, who, though he is dead, still lives in his good works and teaches by his bright example. I had not the honor of his intimacy, but I have known him personally for more than thirty years, and under circumstances which attracted and enforced my observation. I did not consider him a man of brilliant genius, but a man of great talents, with a mind able to comprehend the greatest subject, and not afraid to encounter the minutest analysis. He was eminently practical, always in pursuit of truth, and always able to control and utilize any idea that he had once fully conceived.

In short, he was a sincere, earnest, diligent man. And this, I suppose, is the secret of his success, the reason why his course through life was always onward and upward. I am informed by those who have had good opportunity to know him in all the relations of life—as a lawyer, a judge, an executive officer, a neighbor, a friend, a professing Christian—that, in their belief, all his duties, in every relation, were fully performed. As a man, he lived a blameless life, and not blameless only, but sweet and attractive, by the habitual exercise of all those benevolent virtues which characterized and adorned his mild and gentle nature. And while he pursued with diligence every line of study which might serve to make him at once a blessing and an ornament to society, he looked steadily beyond this transient scene, knowing that this world is but a school of preparation for that eternity upon which his soul rested with undoubting faith. I think the outlines of his character may be sketched in a very few words. He was a ripe scholar; an able lawyer, as you, his brethren must know; a bland and amiable gentleman; a strict moralist; a virtuous man; and, above all, a modest and unobtrusive Christian philosopher. It is not for us to judge of his final condition; but, as feeling and thinking men, when we view the spotless morality of his life, and the quiet meekness of his piety, we have good reason to hope that

even now he is enjoying the rich reward of a well spent life, in blissful communion with the spirits of the just made perfect. This much, at least, we do know, that his life has been a blessing to many individuals and a great benefit to his country, and that, dying in honored old age, he has left behind him the sweet savor of a good name.

Mr. Chief Justice Taney replied:

The members of the court unite with the bar in sincere sorrow for the death of the late Mr. Justice McLean. He held a seat on this bench for more than thirty years, and until the last two years of his life, when his health began to fail, was never absent from his duties here for a single day. His best eulogy will be found in the reports of the decisions of this court during that long period of judicial life, and these reports will show the prominent part he took in the many great and important questions which from time to time have come before the court, and the earnestness and ability with which he investigated and discussed them.

They are the recorded evidence of a mind, firm, frank and vigorous, and full of the subject before him at the time.

Before he occupied a seat on this bench, he filled the office of Postmaster General of the United States, and in that post displayed an administrative talent hardly ever surpassed, with a firmness of character, and uprightness of purpose never questioned. Words of eulogy are hardly needed in memory of one so widely known and respected, eminent in political as well as judicial life.

We deplore his loss, and join the members of the bar in paying due honor to his memory, and direct the motion of the Attorney General, and the resolutions of the bar in relation to our deceased brother, to be placed on record, with this response from the court; and, as a mark of respect, we will adjourn to-day without transacting any of the ordinary business of the court.

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CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

THE CELESTINE.

DISTRICT COURT. — DISTRICT OF WISCONSIN. — SEPTEMBER TERM, 1851.

IN ADMIRALTY.

DOMESTIC VESSELS. EFFECT OF STATE STATUTE.

1. The statute of the State of Wisconsin for the collection of demands against domestic boats and vessels, confers no lien.

2. The District Court in admiralty has, therefore, no jurisdiction *in rem* against a domestic vessel at the suit of a domestic creditor.

3. SEIZURE UNDER STATE LAW. A vessel may be seized under the State law, and from that time the State Court and its officers have exclusive jurisdiction and control. A creditor can not in this Court obtain any control of the property, or share in the proceeds.

4. JURISDICTION EXCLUSIVE. The doctrine is well settled that when a court has jurisdiction, it has a right to decide every question arising in the case, and its judgment, until reversed, is binding upon every other tribunal.

5. When the jurisdiction of one court has attached, other creditors must submit their claims to its consideration, or await its disposition of the case.

6. Numerous cases cited and commented upon.

This vessel was attached by the marshal, in pursuance of process issued from this court, upon the libel herein filed, praying a condemnation and sale, to satisfy the demand of this libellant, for materials furnished and work done, in necessary repairs at the port of Racine within this district.

The sheriff of Racine county, without submitting himself to the jurisdiction of this court, filed his petition in the form of an answer, setting forth, that previous to the service of the process in this case by the marshal, he had attached and reduced into his possession this vessel, by virtue of an attachment or warrant issued from a court of this state in the county of Racine, at the suit of one Thomas W. Secor in pursuance of a law of this state for the collection of debts and demands against boats and vessels navigating the waters thereof; that the several demands of said Secor and of this libellant were contracted within this state; and that both these persons are citizens of this state; and that this vessel was built and is owned within this state. He therefore prayed that the vessel be surrendered into his possession. These facts were conceded by the parties at the trial.

Bush & Sanders, for libellant.

J. R. Doolittle, for respondent.

MILLER, J. The question, whether the law of this state, for the collection of demands against boats and vessels, confers a lien for the debts or demands therein specified, is here properly presented to this court. A similar question has been mooted in this court, and in the courts of other districts, in regard to this law, and similar laws of other states. In the states of New York, Pennsylvania and Maine, local laws exist, creating a lien in favor of material-men and mechanics, upon domestic vessels. In the statutes of New York and Maine the lien is expressly conferred; by the Pennsylvania statute vessels are made liable and chargeable, for materials and work in their construction, until they sail or leave port; and these demands

must be first paid.[1] The statute of this state provides that "every boat or vessel, used in navigating the waters of the state, shall be liable for all debts contracted by the master, owner, agent or consignee thereof, on account of supplies furnished for the use of such boat or vessel; or on account of work done or services rendered on such boat or vessel; or on account of labor done or materials furnished by mechanics, tradesmen or others in and for building, repairing, fitting out, furnishing or equipping such boat or vessel; for all sums due for wharfage or anchorage of such boat or vessel within the state; for all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment; or any contract touching the transportation of persons or property entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed; and for all injuries done to persons or property by such boat or vessel."—"Any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, agent or consignee of a boat or vessel, may, at his option, institute suit against such boat or vessel by name;" by filing in the clerk's office a complaint against such boat or vessel by name, and obtaining therefrom a warrant commanding the sheriff to seize the boat or vessel mentioned. Justices of the peace are also authorized to administer this law in cases within their jurisdiction. This law creates a liability on the part of boats and vessels navigating the waters of the state, to suits for the demands therein stated, and limits those suits to one year after the cause of action shall have accrued.—Neither the term *lien*, nor a term of like import, as *chargeable*, occurs in the statute. The laws of the states referred to create a lien for supplies, but this law extends to demands for damages accruing from the non-performance or mal-performance of contracts of affreightment, and contracts touching the transportation of persons and property, and injuries done to persons or property by a boat or vessel. If the demands of the materialman and mechanic were alone provided for, as in these other

[1] Davis *vs.* A New Brig, Gilpin 473, 487; Harper *vs.* The New Brig. Id. 536.

state laws, it would be right and proper to construe this statute as favorably as possible for their protection; but their demands are in the same category with all the other causes of liability.

It has always been the policy of the courts of this country to discourage secret or uncertain liens, as prejudicial to the transfer of property, and to the interests of trade and commerce. Laws creating liens, either upon real estate or personal property, provide for their record, so that the world may be notified of them. There can be no doubt but the design of this statute was to provide additional means for the recovery of the several debts or demands therein specified; but before I should go further and declare all such debts to be liens, I must be thoroughly satisfied, both as to the statute itself, and that the Legislature had the power to enact such a statute.

The state laws before alluded to limit the liens to the sailing of the boat or vessel, or to twelve days thereafter; this law limits the commencement of suit to one year after the cause of action shall have accrued. These laws are correct in policy, and can be administered without prejudice to any one. They are confined to domestic vessels, and domestic creditors, and to contracts on shore. Furnishing materials and doing work on domestic vessels are as notorious as the furnishing materials and performing work in the erection of a building. This law does not stop here, but includes all boats and vessels used in navigating the waters of the state, as well foreign as domestic; and also damages arising upon contracts of affreightment, and for injuries done by such boats or vessels to persons or property without regard to locality. Now, neither the policy of this law, nor of the laws of the country, nor the understanding of the people, nor the interests of trade and commerce, favor a secret or unknown lien upon a boat or vessel for uncertain or unliquidated damages. A foreign boat or vessel may be used in navigating the waters of this state; but can the Legislature of the state create a lien on such boat or vessel before she enters a port of the state?—This statute does not provide for bringing into court any lien-creditors; nor that any such creditors may intervene for their interests; nor for any notice of the at-

tachment; nor for the sale of the boat or vessel, so as to vest in the purchaser an unincumbered and indefeasible title thereto. It authorizes an order to sell the boat or vessel; which order should be executed and returned in the same manner as executions. And it further provides that "whenever an order of sale shall be made for the sale of a boat or vessel, with its tackle, apparel, and furniture, the sheriff or constable shall have power to sell such part thereof, or such interest therein, as shall be necessary to satisfy the amount of the judgment rendered in favor of the plaintiff, and all the costs that may accrue." It is questionable whether the officer is authorized to sell more than an interest in, or part of, the boat or vessel, under this statute. It would be preposterous to allege, that under the statute, an officer could sell a boat or vessel, with her tackle, apparel, and furniture, worth thousands, upon an order of sale for a comparatively inconsiderable sum; and that such purchaser should hold such boat or vessel clear of all liens. A lien given by the maritime law is preferred to a *bona fide* purchaser without notice, and is even preferred to a claim of forfeiture on the part of the Government of the United States.[1] In the admiralty, all persons having demands against boats or vessels, or interested therein, are permitted to intervene and are presumed to have notice of the proceeding; for this reason a sale in pursuance of a decree in the admiralty confers upon the purchaser an indefeasible title against the world, discharged of all liens whatsoever. Not so under this statute. A purchaser of a boat or vessel or of a part of, or of an interest in, a boat or vessel under this statute, is in no better condition in regard to liens given by the maritime law, than the original owner. The sale of a part, or of an interest in the boat or vessel is inconsistent with a lien on an entire boat or vessel. A lien enforced in the admiralty requires the sale of the entire vessel, not of a part, or of an interest therein.

As liens on vessels cannot be created by the laws of a state in cases of contract or tort, without the territorial limits, the exigencies of commerce required the summary process of the

[1] The Bark Chusan, 2 Story, 456. The St. Jago de Cuba, 9 Wheaton, 409.

admiralty, in cases of steamboats and vessels afloat, or employed in business of commerce and navigation on the lakes. For this reason Congress passed an act, extending the jurisdiction of the district courts of the United States to certain cases upon the lakes or navigable waters connecting the same. This act was passed February 20, 1845, and confers *quasi* admiralty jurisdiction upon the federal courts of contracts and torts arising in, upon, or concerning steamboats and vessels employed in business of commerce and navigation on the lakes. This act was passed in pursuance of the power vested in Congress by Sec. 8 of the Constitution of the United States, to regulate commerce with foreign nations and among the several states. The statute of this State, providing for the collection of debts against boats and vessels, was enacted in the year 1838; and was transferred into the present revised statutes. As Congress had not conferred upon the federal courts the jurisdiction contemplated by the Constitution, until the enactment of February, 1845, and as this was a territory, the statute may have been proper until that time, or even until the admission of this State into the Union; but whether it is now operative, or to what extent, under the saving clause of the act of Congress of 1845, in regard to foreign vessels navigating the lakes, or demands arising out of the state, is not to be determined at this time, this case not requiring a decision. I merely advert to the point to avoid any misunderstanding of this opinion. I shall merely remark that, generally, where the Constitution of the United States confers power of legislation upon Congress, state laws become inoperative upon the legislation of Congress on the same subject. And state laws have not extra-territorial operation or effect. The case under consideration is in regard to a domestic vessel and domestic creditors, which are proper subjects of state legislation. It is the duty of the state legislature to enact statutes for the control of property belonging to the state, and for the protection of the interests of citizens of the state. From the examination here given of the present statute, I am well satisfied, that it is entirely insufficient for these great purposes. The statute itself

does not create "a lien upon boats and vessels, used in navigating the waters of this State;" but the first lien or security created or allowed is upon the service of the attachment. Such is the decision, in the District Court of the United States for the Northern District of New York, upon a similar statute of the State of Ohio.[1]

It is clear that the state court had jurisdiction, full and complete, of the proceeding referred to, and that this vessel was rightfully and legally attached by the sheriff of Racine County before the filing of the libel or the service of the monition in this case. If, as has been shown, the state law had created a lien, whereby this court can acquire jurisdiction by admiralty process *in rem*, then there would be concurrent jurisdiction in both courts; and in that case the right to maintain the jurisdiction must attach to that tribunal which first exercises it and takes possession of the thing in litigation. In order to avoid a clashing of jurisdiction, this course is indispensable, and has been enforced in the national courts, in numerous instances. The authority of the sheriff to attach, and right to hold, this vessel, by virtue of the process in his hands, can not be questioned. This vessel was in the custody of the law, and the marshal had no right to remove it from the possession of the sheriff. In such cases the marshal or sheriff should either retain the process until the first case is disposed of, or should return it not served on account of a previous attachment or levy, so as to avoid conflict of jurisdiction. The proceeding in the state court is in the nature of a suit *in rem*, and the necessary result of such proceeding or suit, is, that the thing in litigation is in the custody of the law. It must necessarily be in the possession or under the control of the court, and the court has a right to order it to be taken into the custody of the law.[2] This is not applicable however to the case of the paramount right of a libellant to enforce

[1] The Globe, 3 Law Reporter, N. S., 488.

[2] The Robert Fulton, 1 Paine C. C., 620; Jennings *vs.* Carson, 4 Cranch 2; Peck *vs.* Jenness, 7 Howard, 612.

a maritime lien, in preference to an attachment or execution against the owner of a vessel for a simple debt.

The attachment of property, by an officer, presupposes a right to take the possession and custody of that property, and to make such possession and custody exclusive. If the officer attaches upon *mesne* process, he has a right to hold the possession to answer the exigency of the process. If he levies under an execution, he is bound to sell according to the command of the writ. In *Hagan vs. Lucas*, 10 Peters, 400, the sheriff had levied an execution on personal property, which was subsequently levied on by the marshal. Mr. Justice McLean, in delivering the opinion of the Court, says:—"The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff, having executions in his hands, may levy on the same goods; and, where there is no priority, on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in

the hands of a different officer, and especially by an officer acting under a different jurisdiction." This opinion is reiterated in *Brown vs. Clarke*, 4 Howard, 4. In *Knox vs. Smith*, 4 Howard, 298, the property levied on by the marshal was taken from his possession by the sheriff, upon an injunction and process from a state court, similar in effect to a writ of replevin, at the suit of a third person claiming under a deed of trust. A bill filed in the United States Court, on the chancery side, to set aside the sheriff's levy, was not sustained because there existed a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the United States Court for an attachment. In *Peck vs. Jenness*, 7 Howard, 612, an attachment was issued from the State Court and served, which, according to the laws and practice of the State of New Hampshire, was a lien on the goods attached. The defendants in the attachment afterwards obtained a discharge under the bankrupt law, and their assignee claimed the goods previously attached. Mr. Justice Grier, in the opinion, says: "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and, that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy vs. The Earl of Cassillis*,[1] Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court

[1] 2 Swanston, 313.

of Sessions, in Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The district court was not permitted to oust the state court of its jurisdiction and custody of the property attached. In the case of *Slocum vs. Mayberry*, 2 Wheaton, 1, replevin was sustained in the state court against a revenue officer, by the owner of goods that were seized without process, and were not such goods as were authorized by law to be seized; as the common law tribunals of the United States were closed by law against such remedies, they being cognizable alone in the admiralty. But in this case and in *Gelston vs. Hoyt*, 3 Wheaton, 246, it is determined that an action will not lie against the seizing officer in any common law tribunal until a final decree is pronounced in the admiralty upon the proceeding *in rem*. In the former case, Marshall, C. J., remarks that—"The judiciary act gives to the federal courts, exclusive cognizance of all seizures made on land or water. Any intervention of a state authority, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act; and the federal court having cognizance of the seizure, might enforce a re-delivery of the thing, by attachment or other summary process against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure, can not, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the court having cognizance of the cause." "This, however, being an action which takes the thing itself out of the possession of the officer, could not certainly be maintained in a state court, if, by the act of Congress, it

was seized for the purpose of being proceeded against in the federal court." Goods or vessels attached or levied on, in pursuance of process issued from a court of competent jurisdiction, are thereby reduced into the custody of the court for the purpose of being proceeded against in satisfaction of the process, or of the debt or demand of the plaintiff or libellant, and can not be taken from the possession of the officer making such attachment or levy, upon process emanating from another and different tribunal.

In all cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively.[1] The party at whose suit property is attached has a constitutional and legal right to the law of the court issuing the process. If, according to the law of the court issuing the process, the property attached is found to belong to the defendant, the plaintiff claims from that court, through its officer, satisfaction of his demand, out of that property. A court of another government and different jurisdiction can not interpose between that plaintiff and the property attached, and transfer the legal possession, or vest the legal title in a third person, or assume the exclusive custody or disposition of the property. When a party issues his process and attaches property, he is presumed to know his right to do so, according to the law of the court in which he becomes a suitor; and that court is bound to dispose of his cause according to its law. But to compel a suitor in one court to follow the property attached into the forum of a different government, and there contend for satisfaction of his demand according to its law and rulings, would be a grievance and an abuse not to be tolerated; would create a serious conflict of jurisdiction, which should always be avoided by well-regulated courts and all good citizens. Goods and chattels in the possession of a defendant are liable to attachment or levy; and when attached or levied, they are in custody of the law, and control of the court; and must there remain, either in substance or by the substitution of a bond or security according to the law and practice of the court, until the subject be conclusively determined.

[1] Smith *vs.* McIver, 9 Wheaton, 532.

A court may allow subsequent and additional attachments and levies on the same property by its own officer; and may permit goods attached or levied on by one officer to be replevied by another officer, for it still retains control of the several writs, and the custody of the goods, either in kind or by the substitution of a bond in replevin, upon the service of the writ. But this can not be done by different and independent courts. Either one or the other must have custody of the goods,—both courts can not have it; nor can the officers of both have the possession of them. It is altogether a mistake to suppose that a party may claim goods in the custody of the law, and transfer them into the custody of another court, on the plea that he has a demand against them, or that they have been wrongfully taken from him. He must submit his case to the consideration of the court having custody of the goods, or wait until a final disposition be made of them, as in the case of conflicting executions. In *De Wolf vs. Harris*, 4 Mason, 515, replevin was maintained, in the Circuit Court of the United States against the marshal, for goods seized by him.

A state court has no authority to enjoin a judgment or execution, or restrain a party in a court of the United States; neither can the United States courts interfere with proceedings or suitors in the state courts.[1] Injunctions being specially granted, on consideration of a bill, upon notice and hearing, are not so likely to prejudice a party or embarrass a judicial proceeding, as an attachment, execution or replevin, which are issuable by the clerk upon an affidavit or *præcipe*. Nor may it work so much injustice by merely restraining the action of a party for a time, as the other writs, which in their nature sweep from him his secured lien. Upon the writ of attachment the officer attaches goods and retains them in possession to satisfy the plaintiff's demand, or delivers them to the defendant on his bond. Upon an execution the officer makes sale—upon replevin he delivers the goods to the plaintiff on

[1] McKim *vs.* Voorhies, 7 Cranch, 279; 3 Story Const., §§ 1751, 1752; The United States *vs.* Peters, 5 Cranch, 115; McClung *vs.* Silliman, 6 Wheaton, 598; *Ex parte* Dorr, 3 Howard, 103; Diggs and Keith *vs.* Wolcott, 4 Cranch, 178; *Ex parte* Cabrera, 1 Washington, 232, and many other authorities.

his giving bond for a return, or the value, with damages, without any judgment of a court on the question of title or any inquisition by the officer, or writ *de proprietate probanda*. The party or person obtaining possession by process of law has the legal possession. The possession of the party served with the process is transferred to him, and the security of the original plaintiff in the goods is gone.[1]

The pendency of a replevin in a state court, to settle the right of property in a vessel, is a bar to a libel in the admiralty, to settle the same right between the same parties; not technically a bar as a plea of *lis pendens*, but effectively so to prevent conflict of jurisdiction.[2] And an attachment for the debt by the process of a state court, after the commencement of the suit for the recovery of that debt in a court of the United States can not affect the right of the plaintiff to recover in the suit.[3]

The governments of the United States and of the several states are sovereign and independent within their respective limits as prescribed in their several constitutions. Equally so are the courts of the respective governments independent of each other. One court has no power to supervise, or enjoin, or interfere with the proceedings in the other, excepting where authorized in pursuance of provisions contained in the Constitution of the United States; in cases of decisions in state courts against the Constitution, or a treaty, or law, or authority, or officer of the United States; and in the removal of causes to the circuit courts, or district courts having circuit court powers, by aliens or non-resident defendants; and where citizens of the same state claim lands under a grant from another state.

I have investigated this case sufficiently to satisfy my mind that this court has no jurisdiction in admiralty; and that, if it had, this vessel, being previously attached by the sheriff of Racine county and in the custody of the law, could not be

[1] Lowry *vs.* Hall, 2 Watts & Sergeant, 129; Morris *vs.* DeWitt, 5 Wendell, 71.

[2] Tyler *vs.* the Royal Saxton, Wallace, Jr., 311.

[3] Wallace *vs.* McConnell, 13 Peters, 136; Campbell *vs.* Emerson, 2 McLean, 30.

subsequently attached by the marshal. It is thereupon ordered, that this libel be dismissed, and that the marshal return this vessel to the possession of the sheriff of Racine County.

Later rulings of the Supreme Court maintain the jurisdiction *in rem* under state laws in certain cases. The Steamer St. Lawrence, 1 Black, 522, and cases there cited. It is there ruled that the change in the 12th rule in admiralty, meant merely that various considerations made it advisable not to permit that particular form of process to be used by persons who might claim it on the sole ground that the state law gave them a lien, where none was given by the maritime code.

Where the lien is claimed as arising out of private contract with the owner, it will be enforced against a domestic vessel. The Kalorama, 10 Wallace, 204.

Or where there is a possessory lien at common law. The Schooner Marion, 1 Story, 68.

That the state law of Kentucky creating liens on domestic vessels does not confer jurisdiction on the courts of the United States was decided in Roach *vs.* Chapman, 22 Howard, 129, citing People's Ferry Company *vs.* Beers *et al.* 20 Howard, 393.

For the proper rules in cases where conflicting claims are set up under state and federal jurisdiction, see the following cases, elaborately argued and decided: Taylor *vs.* Carryl, 20 Howard, 583; Freeman *vs.* Howe, 24 Howard, 450.

Where a vessel had been seized under process from a state court, proceedings under a libel are irregular. A seizure by the marshal when the vessel was in the actual and legal possession of the sheriff, does not give jurisdiction *in rem*. The admiralty jurisdiction of the United States courts, though exclusive on some subjects, is concurrent on others. Taylor *vs.* Carryl, 20 Howard, 583; see also The John Richards, *post p.* 106.

But the possession of the sheriff does not defeat the operation of the Revenue Laws. The United States *vs.* The Bark Reindeer, 2 Clifford, 57.

As to effect of state statute, see opinions of SHERMAN J., *in re* Dwight Scott, 3 Bankrupt Register, 181; also of LONGYEAR J. in Moir *vs.* The Du Saque, 4 American Law Times, 84.

That liens on domestic ships, given by a state statute, in cases maritime in their nature, may be enforced in admiralty, is declared in The Richard Busteed, 1 Sprague, 441. See also, Peyroux *vs.* Howard, 7 Peters, 324.

The district court, however, exercises the jurisdiction, thus acquired, according to the mode of proceeding in admiralty, not according to the state law. Davis, *vs.* A new Brig, Gilpin, 473. See also, Boon *vs.* The Hornet, Crabbe, 426; Tree *vs.* The Indiana, Crabbe, 479.

CONTRA. A court of admiralty has no jurisdiction *in rem* to recover for work, labor, and materials furnished in building a ship, even though the state law gives a lien upon the vessel. The ship Norway, 3 Benedict, 163.

In the American Law Review, Vol. 5, page 581, will be found an able and elaborate article by R. H. Dana, Jr., reviewing the whole subject of admiralty jurisdiction and the successive decisions on the question.

The statute of California, declaring vessels subject to liens for materials or supplies, is valid and operative even in its application to a vessel supplied in her home port, so far as to entitle the claimant to payment out of surplus remaining in the registry after the satisfaction of maritime liens in preference to a mortgagee of the vessel. The Harrison, 2 Abbott 74, where the successive decisions of the Supreme Court concerning the enforcement of such liens by proceedings *in rem* are reviewed and explained.

The Supreme Court of Indiana holds that the statute of that state, for the enforcement of liens upon domestic craft is, under the rulings in The Hine *vs.* Trevor, 4 Wallace, 555, void; that, the jurisdiction of the federal courts being exclusive, the state courts can entertain no jusdiction. Ballard *vs.* Wiltshire, 28 Indiana, 341; Vaughn *vs.* McCullough, Ib. 359; Claycomb *vs.* Cohn, Ib. 483.

In each of these cases, the Court directed the case to be dismissed.—[*Reporter.*]

THE JUNIATA PATON.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—NOVEMBER TERM, 1852.

IN ADMIRALTY.

1. CARRIER,—WHEN RELIEVED FROM DANGERS OF NAVIGATION. Where a bill of lading contains the clause "dangers of navigation excepted," the carrier brings himself within the clause, when he shows that on a dark and stormy night, at the entrance of a harbor difficult of access, he mistook a light on shore in a line with the pier-light, for the latter, whereby the vessel went ashore and damaged a portion of the cargo.

2. BURDEN OF PROOF. The carrier, in order to avail himself of the benefit of this restrictive clause, must bring his case strictly within the words of the exception, and for this purpose the burden of proof is upon him.

3. A master may enter a harbor on a dark night, with a heavy sea and high wind, notwithstanding access be difficult, but not unusually dangerous or difficult, without incurring the imputation of negligence.

The facts fully appear in the opinion of the Court.

William P. Lynde, for libellant.

Emmons & Van Dyke, for respondent.

MILLER, J. The libellant shipped at the port of Buffalo, on board this vessel, twenty-seven hogsheads and ten barrels of sugar, "to be delivered at the port of Milwaukee, in good order and condition, the dangers of navigation excepted."

This vessel belonged at Milwaukee, and the whole cargo, consisting of railroad iron, and other iron, and these sugars, was consigned to that port. The vessel reached the Milwaukee bay, on the western shore of Lake Michigan, about one o'clock at night, in a storm of rain, high wind from the northeast, very heavy sea, and night very dark. The light-house light is over one mile and a half from the harbor, at the mouth of the Milwaukee river, where it was usual to have an additional light. After the vessel made the light-house light, she stood for the harbor, intending to put in. She made a light which was believed to be the light on the pier, it being in the same range and resembling the pier-light, but it turned out to be a light on shore. The mistake was not discovered until immediately before the vessel struck. About ninety per cent. of the sugar was lost by the accumulation of water in the hold.

The steamboat Baltic was making for the same light, following close in the wake of the Paton, under the belief that it was the harbor light, and did not discover the mistake until the schooner struck, when she put about and saved herself.

The master of the Paton was, no doubt, from the evidence, competent, and the vessel and crew were in every respect sufficient. It appears, also, that all hands aboard were vigilant and faithful in the discharge of their duties; and that they were at their posts, and that the master once went aloft to satisfy himself of the light.

The owners of schooners employed in the carrying trade upon the lakes are common carriers, and liable as such, unless the loss should occur in an excepted peril. The risks, for which common carriers are liable at common law, include those of all losses, except by the act of God or the common enemy. In the implied, or common law exception of the act of God, the cause of the casualty must be immediate, and stripped of all human means or agency.

The exception in this bill of lading, of the dangers of navigation, is to be understood in a broader sense than to denote natural accidents. It extends to events not attributable to natural causes. It is extended so as to excuse the carrier from losses by collision of two ships, when no blame is imputable to his ship. But there is no doubt the carrier should not be excused, if the loss occurs by a peril which might have been avoided by the exercise of any reasonable skill or diligence.[1] The case of *McArthur and Hurlbert vs. Sears*, 21 Wendell, 190, is quite similar to this, but the judgment of the court was against the defendant, as he stood chargeable as a common carrier without this exception, or any qualification whatever.

The words forming the exception in this bill of lading are understood in the same sense as in a policy of insurance. The shipper is his own insurer against the dangers of navigation.

Where the benefit of an exception is claimed from loss being occasioned by a danger of navigation, it is incumbent on the carrier to bring himself strictly within the terms of the exception. It is by no means unreasonable to require him to prove the loss and the manner of it, and that usual care and diligence had been used to avoid it. This is peculiarly within his own knowledge, or those in his employment and under his control.

The bailor or shipper is left, in a great measure, at the carrier's mercy, from the fact that he has the exclusive custody of the goods, and to convict him of neglect is almost impossible. The crew of the vessel are usually the only persons cognizant of the matter, and are not expected to implicate themselves. And the owner can seldom have any other account of his property, or of the facts connected with its loss, than what they may choose to give. For these reasons, testimony from those employed on board, in support of the exemption claimed, must be cautiously considered. But, fortunately for the respondent, the testimony of these witnesses is corroborated in every es

[1] 1 Smith's Leading Cases, 232, 3, 4. Angell on Carriers, §§, 167 to 172 Abbott on Shipping, 284, 5, 6. Story on Bailments §§ 510 to 512. Clark *vs.* Barnwell. 12 Howard, 272.

sential particular by the mate of the steamboat Baltic, and other disinterested witnesses.

It was contended that the vessel should have kept out over night, and should not have attempted entering the harbor during the gale and storm, in the extreme darkness of the night. Some masters of vessels do not come in nights; others do. The Baltic was bound for Milwaukee, and intended coming in that night. The Paton belonged at Milwaukee, and was freighted exclusively for that port. The entrance at the harbor is not unusually dangerous or difficult. The master of this vessel, under these circumstances, was in the discharge of his duty, in coming into port with his vessel and cargo without delay. If he had kept out and the vessel were lost, under the proof of the crew and of the mate of the Baltic, as to their belief, that the light on shore was the harbor light, a liability might attach more readily than in this case.

In making for the harbor, the vessel stood westward, with the light-house light one mile and a half north. The mouth of the harbor is nearly in line north and south with this light. The angle of the vessel's position with this light was not sufficient to have admonished those aboard of their near approach upon the shore. The sea was running high, the vessel before the wind, and the darkness of the night was so intense as to render it impossible for the master on deck, or aloft, to calculate with any degree of certainty the distance to the light on shore.

Libel dismissed.

See The Portsmouth in subsequent volume of these Reports, and 9 Wallace, 682.—[*Reporter.*]

HATCH vs. PRESTON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL TERM, 1853.

1. JURISDICTION. The fact that a suit is connected with and grows out of matters litigated in a state court, does not prevent this court from taking jurisdiction in the case, if otherwise within the 12th section of the act of 1789, for the removal of cases from the State to United States courts.

2. A decree of the state court binds all parties before it, and this court will not reverse or alter it, but where a second suit is brought to connect other parties with the transaction and obtain a decree against them, there is no force in the objection that this is not an original proceeding, and that this court by assuming jurisdiction, would interfere with the decree of the state court.

3. The defendants not being precluded from maintaining the main point in controversy here by anything appearing in the decree of the state court, it is within the meaning of the act a suit commenced against them.

Blackwell & Beckwith, for plaintiff.

Mr. Grimshaw, for defendants.

The facts are stated in the opinion of the Court.

DRUMMOND, J. On the 18th of March, 1848, Reuben Hatch, the present plaintiff, filed a bill on the equity side of the Circuit Court of Pike County, in this State, against John Preston one of the present defendants, and the representatives of James Wilson. The bill alleged that Hatch and Wilson had become indebted to Preston in the sum of $10,327.20 in four notes, to secure the payment of which they had executed a mortgage on certain lands—that Wilson in 1836 sold his interest to Hatch, and the latter assumed payment to Preston, and Wilson was deceased—that there was due Preston about $10,000—that Preston had become indebted to Hatch in a larger amount on notes of Preston, which had been assigned to him. The bill prayed for a set-off to be allowed and a satisfaction of the mortgage.

Preston answered, stating that the notes given to him had been assigned to a third party, and denied the indebtedness on the notes held by Hatch. In July, 1851, a decree was made allowing the set-off; and in October following, a final decree was entered finding due from Preston to Hatch the sum of $3,069.50, and directing the notes of Hatch and Wilson to Preston to be delivered up by the latter, and on delivery the Master was to cancel them. Preston was required to enter satisfaction of the mortgage, and on default the Master was to do it, and a perpetual injunction was issued against using or negotiating the notes and mortgage. The Master entered satisfaction of the mortgage in conformity with the decree.

At the March term, 1853, a bill was filed on the equity side of the same court against Preston and Thaxter, the present defendants, who at the time were not citizens of Illinois, by Reuben Hatch, now plaintiff, at that time a citizen of Illinois. The bill recited the foregoing facts, and alleged that Preston had not delivered up the notes, and that Thaxter pretended to be the owner of the notes and mortgage and threatened to sue to recover the same; that Preston fraudulently transferred them to Thaxter to evade the decree after the equitable right of set-off had accrued, and after the suit before mentioned was commenced. The bill charges that Preston is the real owner of the notes and mortgage, and was at the time the bill was filed in 1848; that the allegation made by Preston in his answer that he had assigned the notes was disproved in the former case. The bill prays for an injunction, &c., and that the notes and mortgage be delivered up, &c. The defendants being non-residents, notice of the suit was given according to the practice in this state.

At the proper time the defendants presented their petition to have the cause removed to this court under the act of Congress, and it was removed accordingly.

At this time the counsel of the plaintiff moved to dismiss the cause for want of jurisdiction, and to remand it to the court from which it came, as having been improperly sent here.

The act of Congress provides that, if a suit be commenced

in any state court by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, the cause shall be removed on a proper application to the Circuit Court of the United States.[1]

There is no objection made to the form or manner of the application, and it is not denied but the parties were in a condition as to citizenship, to enable the defendants to avail themselves of the act of Congress. But it is strenuously insisted, that this bill is not an original proceeding, but is a mere sequence of the former suit in the state court. The plaintiff had obtained a decree for the delivery of the notes, and that satisfaction should be entered on the mortgage, which last has been done in accordance with the decree, but the former has not, and the allegation is, that Thaxter is by collusion the mere nominal owner of the notes, and the objection is that if this Court assumes jurisdiction of the case, it will be an interference with the decree of the State Court.

It may be admitted that this controversy is connected with the litigation in the State Court, and the bill seeks in some sort to carry the decree into effect as to the delivering up of the notes. But if the Court were to go on and do what the bill wishes to be done, it would do no more as to Preston than the State Court has already done. A court of equity would hardly sustain jurisdiction of a cause for the purpose of repeating decrees already made. It could only be in consequence of the altered condition of the parties, or of new facts, that the court would look into the case anew. If this bill necessarily involved a revision or alteration of the decree of the State Court, there would be great weight in the objection of the plaintiff's counsel, but it seems to me that it does not. In fact, the bill does not ask for it, and even if the cause were to proceed in the State Court, the decree would have to stand.[2] It must be the same here.

[1] 12 Section of the Judiciary act of 1789, 1 Statutes at large, 79. Gordon *vs.* Longest, 16 Peters, 97.

[2] Story's Equity Pleading § 429, 430.

This court could not in this proceeding interfere with or modify the decree of the State Court. So long as it is unreversed it is binding upon all the parties to it. But the main point is as to the effect of this decree upon those who were not parties, and while it is clear that Preston is bound by it, it is equally clear, that from anything that appears upon the face of the proceedings in the State Court, Thaxter is not bound by that decree. If binding on him, it must be in consequence of something not brought to the knowledge of the State Court, and it is avowedly for the purpose of obtaining a decree binding upon him that the present bill is filed. The only question therefore for this court to examine, is, whether this is a suit commenced in the State Court against these defendants, within the meaning of the 12th section of the Judiciary Act. If it is, then the duty of this court to entertain jurisdiction is imperative, as much so, as is the obligation, in such circumstances, on the part of the State Court to decline jurisdiction. And after a proper application has been made in a proper case to the State Court, to remove the cause to the Circuit Court of the United States, any subsequent step in the State Court is illegal and invalid.[1] And it would appear there could not be much doubt but that this is a suit commenced against these parties within the meaning of the act of Congress. It is not the less a suit because it grows out of matters already litigated between one of the defendants and the plaintiff, and is, in some respects, connected with that suit. The main question, it would seem, to be decided in this case, will be whether Thaxter held the notes *bona fide* by assignment in due course of business before their maturity, a fact which, if it exist, he is not precluded from showing by anything that appears in the decree of the State Court.

The motion to dismiss and to remand the cause is consequently overruled.

[1] Gordon *vs.* Longest, 16 Peters 97.

WRIGHT vs. SHUMWAY.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—AUGUST TERM, 1853.

IN EQUITY.

1. SETTLERS ON UNSURVEYED LANDS.—A covenant on the part of settlers on unsurveyed lands of the United States, to purchase those lands, as soon as surveyed and offered for sale by the government, and then mortgage them to a creditor, to secure a debt, is not a contract in violation of sections 4 and 5 of the act of Congress approved March 31, 1830, for the relief of purchasers of public lands, and for the suppression of frauds at public land sales.

2. A mortgage given to secure a debt due and payable, no time of payment being specified, may be redeemed or foreclosed at any time.

3. WHAT CONSTITUTES A MORTGAGE IN EQUITY.—An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. A covenant by a debtor with his creditor, to purchase certain lands, and then mortgage them to him will be enforced in a court of equity by a decree of sale.

4. Where a settler on public lands, entitled to a preëmption, procures a capitalist to pay the purchase money of the land into the land office of the United States, and allows him to take the receiver's receipt in his own name, or makes an assignment to him of his certificate of location as his security for such payment, receiving back the bond of said capitalist for a deed upon the repayment, on a certain day, of the purchase money with interest, this is in equity a mortgage of the land, redeemable by the settler or his alienee at or before the time of payment, according to the condition of the contract.

5. ENURING TITLE.—A mortgagee of lands to which the mortgagor had no present title, is entitled in equity to the benefit of an after-acquired title.

The defendants, Charles N. Shumway, John P. Shumway, Jabez N. Rogers, and John S. Harris, in the year 1849, became indebted to the complainants, by several promisory notes in the sum of twelve hundred dollars. In December, 1850, Charles N. Shumway and John P. Shumway, having settled upon, and being in possession of, unsurveyed public lands, in this state, executed and delivered to complainants a deed, or instrument under seal, by which, for the consideration of one dollar, they sold, assigned, and conveyed to them all their right, title, and interest in those lands, describing them, together with all the water privileges, rights and easements, and

other appurtenances, and the buildings erected on the same. The deed provided, that "the property hereby assigned, being intended to include all the claims held by us for the parties of the first part, on the lands now occupied by them, and yet unsurveyed, and not sold by the United States, to have and to hold the same to the said Edward and Augustus and their heirs forever. This grant is intended as a security for the indebtedness of the said parties of the first part to the said party of the second part, consisting of three notes, in all about twelve hundred dollars besides interest. And the said parties of the first part covenant and agree with the said parties of the second part, that they will purchase the said land of the United States whenever the same shall be surveyed and exposed for sale, and will mortgage the same with the appurtenances to the said parties of the second part, their survivors or assigns to secure the indebtedness aforesaid, or such part thereof as may be then unpaid, as soon as the land shall be exposed for sale." The deed was filed with the town clerk, as a chattel mortgage, and also recorded in the office of the register of deeds, as a mortgage of real estate, in October, 1852. In October, 1851, the defendant, Jabez N. Rogers, by his deed, duly executed and acknowledged, confirmed the aforesaid deed, and conveyed to the complainants his interest in the premises, for the purpose of securing the debt. The lands being surveyed, were offered for sale by the United States, in June, 1852.

In November, 1852, John P. Shumway proved up a preemption right, and entered one hundred and sixty acres of the land, which included the village of Wautoma, and assigned the certificate of location to John Fitzgerald, one of the defendants, in consideration of the payment by him of the purchase money, at the land office, at the request of Shumway. And at the same time, Fitzgerald entered in his own name, one other quarter section of the land, for Charles N. Shumway, of which he claimed a right of preemption. Fitzgerald having purchased the two quarter sections, at the instance and request of the Shumways, gave to each of them a bond in the

penalty of five hundred dollars, "conditioned that he shall make to them respectively a deed for his particular quarter section described in the bond, on paying to him two hundred dollars with interest, within two years thereafter, and also paying the annual taxes."

After those two quarter sections were entered at the land office by Fitzgerald, demand of a mortgage was made by complainants of the Shumways, in pursuance of their covenant.

Bill taken as confessed against John S. Harris one of the defendants, and also against Rogers, he not claiming any interest in the lands. The Shumways and Fitzgerald make defense.

Winfield Smith, for complainants, cited:

Barber vs. Harris, 15 Wendell, 617; 2 Powell on Mortgages, 522 and note; 3 Id., 1049; *Foster vs. Foust*, 2 Sergeant & Rawle, 11; *Ex parte Wills*, 1 Vesey, Jr., 162; 1 Smith's Leading Cases in Equity, 510; 2 Id., 302,3,4; *In re Howe*, 1 Paige, 125; 4 Kent, 150; *Sarah Deacon vs. Eleanor Smith*, 3 Atkyns 323; *Mitchell vs. Winslow*, 2 Story, 630; *Gilmer vs. Poindexter*, 10 Howard, 257; *Lambert vs. Nanny*, 2 Munford, 196; *Patterson vs. Johnston*, 7 Hammond, 225; *Thompkins vs. Mitchell*, 2 Randolph, 428; *Marshall vs. Bush*, 1 Morris, 275; *Kizer vs. Lock*, 9 Alabama, 269; *Carter vs. Rockett, et al*, 8 Paige, 437; 2 Story's Equity Jurisprudence, §§ 64, 159, 790, 1216, 1231.

Francis Randall, for defendants.

MILLER J. It is contended on the part of the defendants, that the deed of the Shumways to complainants is a contract in violation of the act of Congress, approved March 31, 1830,[1] entitled "An Act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," and is therefore void. I do not think that this position is tenable. There is

[1] 4 Statutes at Large, 392.

nothing in the deed tending to the formation of a combination of purchasers, or to prevent biddings for the land at a government public sale.

But the improved portion of the land was not intended by the Shumways to be the subject of a public sale. As settlers and improvers, at the date of the deed, they considered that their right to preemption would be secured, which was afterwards perfected through Fitzgerald. The deed is not within the prohibition of the act. Private sales of pre-emption claims of settlers are recognized as valid, by the federal courts.[1]

At the date of the deed, the Shumways had peaceable and undisturbed possession of the land, with the tacit or implied assent of the United States, and had erected thereon a saw-mill, dwellings, a tavern stand and other buildings; and they had an inchoate right of pre-emption. In consideration of their indebtedness to the complainants, they made the deed as a security. The debt was then payable. A conveyance, covenant, or mortgage, founded on a past consideration, is valid. When the money is due and payable, and no time is mentioned in the mortgage for its payment or redemption, a foreclosure will be decreed at any time. And a mortgage intended to secure a certain debt is valid in equity, for that purpose, whatever form the debt may assume. The consideration expressed in the deed is valuable and is sufficient to authorize the court to enforce performance of its covenants.

It is further contended, that the deed is of no validity, the premises not being legally vested in the Shumways. The deed does not purport to be a mortgage of the fee, but nevertheless it may be valid. In equity, whatever property, real or personal, is capable of an absolute sale may be the subject of a mortgage. Therefore, rights in remainder, and reversions, possibilities coupled with an interest, rents, franchises, and choses in action, are capable of being mortgaged.[2] And courts of equity support assignments of, or contracts pledging property, or contingent interests therein, and also things which have no

[1] Bush *vs.* Marshall, 6 Howard, 284; Thredgill *vs.* Pintard, 12, Id., 24.

[2] 2 Story's Equity Jurisprudence, § 1021.

present, actual, potential existence, but rest in mere possibility.[1] If a mortgage be made of an estate, to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, a good title, the mortgagee will be entitled in equity to the benefit of it, for it will be considered as a graft into the old stock, and as arising in consideration of the former title.[2]

The deed purports to be a mortgage of all the property or interest of the Shumways then existing, with express covenants "that they will purchase the land and mortgage it to the complainants to secure their indebtedness." By this express written agreement to make a mortgage, a lien is created on the land, in equity, on the principle that what has been agreed to be performed, shall be performed.[3] An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. The agreement in this case to purchase the land, and then to mortgage it, is express, and is a specific lien, which will be enforced in equity.[4] The same principle also seems to be well settled in the courts of this country.[5] I do not deem it necessary to enter into a minute statement of these cases, and also of many others, as I consider the principle to be settled beyond all controversy. The deed is an equitable mortgage, to be enforced by a bill in equity.

The legal title to half the land is in Fitzgerald, subject to

[1] Mitchell *vs.* Winslow, 2 Story, 630.

[2] Seabourne *vs.* Powell, 2 Vernon, 10; Best *vs.* Meddlenurst, 3 Atkyns, 376; Goodright *vs.* Meade, 3 Burrow, 1703; McGinnis *vs.* Noble, 7 Watts & Sergeant, 454.

[3] Houhey *vs.* Vernon, 2 Cox, 12; 3 Powell on Mortgages, 1049. a. b.

[4] Finch *vs.* The Earl of Winchester, 1 Peere Williams, 277; Freemoult *vs.* Dedire, Id. 429; Devlin *vs.* Smith, 3 Atkyns 323; Fooke *vs.* Hastings, 2 Vernon, 97; Loyde *vs.* Mynn, 4 Leonard, 505; Laundell and Wife *vs.* Beerry, Id. 481; Metcalf *vs.* The Archbishop of York, 6 Simons, 224; Burn *vs.* Burn, 3 Vesey, Jr., 573; Legarde *vs.* Hodges, 1 Id. 477.

[5] *In re* Howe and Wife, 1 Paige, 131; Delaire *vs.* Keenan, 3 Desaussure's Equity, 74; Menude *vs.* Delaire, 2 Id. 564; Dow *vs.* Kerr, Speers, 413; Campbell *vs.* Moseby, 6 Littell, 358; Fleming *vs.* Howison, 2 Bibb, 171; Richtee *vs.* Selin, 8 Sergeant & Rawle, 425; Fysor *vs.* Possman, 2 Barr, 122; Longworth *vs.* Taylor, 1 McLean, 395.

the equity of the Shumways, to redeem on or before the day of payment specified in the bonds of Fitzgerald for conveyance. On or before the day of payment, Fitzgerald is obligated to convey to the Shumways, or to their assigns, or to the purchaser under a decree in this case, upon the payment to him of the amount he advanced for the land to the Government, with interest, according to the conditions of the bonds. The Shumways continue to hold actual possession of the land. The bonds of Fitzgerald for deeds, are not conveyances of the land, but obligations, whereupon the Shumways, or their representatives or assigns, may compel, by bills in equity, conveyances of the fee, upon the payment of the purchase money, according to the conditions. The purchase of the land by Fitzgerald, at the instance of the Shumways, the settlers and improvers in possession, and their acceptance of bonds for conveyances, are the same in equity as if they had made the purchases in their own names, with money borrowed of Fitzgerald, secured by mortgage of the land.

It is not necessary to determine the question of priority of lien, as the complainants consent to a decree of sale of the two quarter sections entered by Fitzgerald, subject to his lien, according to the conditions of his bonds to the Shumways, the lands being considered quite valuable, and abundant for the payment of both liens.

A decree of sale is ordered, according to the prayer of the bill.

THE FLORA.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1853.

IN ADMIRALTY.

1. ORIGIN OF ADMIRALTY JURISDICTION ON WESTERN WATERS.—The admiralty jurisdiction on the western lakes and rivers is not limited to cases within the act of February 20th, 1845.

2. The District Court may resort to the act of September 24th, 1789, to sustain its jurisdiction.

In this case the libel alleged that a scowboat, of the burthen of sixty tons, the property of the libellant, was engaged in carrying earth from the excavation of the Chicago harbor, on the waters of the western shore of Lake Michigan, and upon that lake and the navigable waters thereof; that on the 14th of June, 1853, the boat was lying alongside the north pier of the Chicago harbor, and while there was run into and sunk by the brig Flora, a vessel licensed and enrolled, etc., of about two hundred tons burthen, and then bound on a voyage from a port in Michigan to Chicago, loaded with lumber.

The objection was taken that the boat sunk was not licensed and enrolled for the coasting trade, and was not employed *at the time* in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters thereof (all of which was admitted), as required by the act of February 20, 1845,[1] and that the court had no jurisdiction of the case.

DRUMMOND, J.—The ninth section of the judiciary act of 1789[2] gave to the district courts cognizance of all civil causes of admiralty and maritime jurisdiction. The tenth section gave the same jurisdiction to the District Court of Kentucky. The case of the

[1] 5 U. S. Statutes at Large, 726.

[2] 1 U. S. Statutes at Large, 76.

Thomas Jefferson, 10 Wheaton, 428, was a libel filed in the District Court of Kentucky for wages earned in a voyage from a port in that state up the Missouri river and back again to the port of departure. It was a voyage throughout, several hundred miles above the ebb and flow of the tide, and the Supreme Court of the United States held that the decree of the district court, dismissing the libel for want of jurisdiction, was right, because the contract was not a maritime contract "upon acknowledged principles of law."

In the *Genesee Chief vs. Fitzhugh*, 12 Howard, 443, the Supreme Court overruled the decision in the case of the *Thomas Jefferson;* that is, the court decided that the district court, in point of law, had jurisdiction of the matter contained in the libel in that case, and should have proceeded to an adjudication of the rights of the parties, and that the Supreme Court ought to have so held in 1825. If this was correct, then the adjudication of the District Court of Kentucky would have been right, if so made under the tenth section of the law of 1789. There was no other law conferring general admiralty jurisdiction upon that court. And this section shows that the later decision is the true one, because Congress, after granting general admiralty jurisdiction to the district courts in the section immediately preceding, in this confers the same jurisdiction upon the District Court of Kentucky, and yet the geographical position of Kentucky was of course well known to Congress. The second section of the act of March 3, 1819, establishing the District Court of Illinois, gave it the same jurisdiction as the District Court of Kentucky had by the act of 1789. Of course then, under the ruling of the Supreme Court, it had general admiralty jurisdiction over all the navigable waters within the district, and could have taken cognizance of a case like the Thomas Jefferson before the passage of the act of 1845. If, then, it had general admiralty jurisdiction prior to the act of 1845, how could that act "confer a new jurisdiction?" [1] The Supreme Court, in *Fretz vs. Bull*, 12 Howard, 466, ruled in accordance with the principles of the case

[1] The Genesee Chief *vs.* Fitzhugh, 12 Howard, 451.

reported in the same volume, and already referred to, that the district court had jurisdiction in admiralty for a tort on the Mississippi above tide-water; this was not under the law of 1845, and consequently the admiralty jurisdiction of this court would not be confined to the limits and restrictions contained in that law in cases arising on the Mississippi and its tributaries, but we must refer to the act of 1789 as our guide. Does it not follow, if there is no other admiralty jurisdiction on the lakes than what is conferred by the act of 1845, that this court must adjudicate differently when it has cases in admiralty before it on the Ohio or Mississippi, and on the waters of Lake Michigan? For example, in the one case the parties are entitled to a jury, and in the other not. Is there, then, that perfect equality which is referred to, "not only in the laws, but in the mode of administering them"? The court compares the acts of 1789 and 1845, and declares that the jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade, and the act of 1845 extends only to such vessels when they are engaged in commerce between the different states and territories.[1] Is this strictly correct? Certainly the jurisdiction under the act of 1789 is not so restricted. Is there no admiralty jurisdiction on the lakes except what is brought within the act of 1845? Suppose a vessel is engaged in commerce between one of the states and Canada, is it not within the admiralty jurisdiction of this court if it enters the harbor of Chicago? We have Canadian vessels here daily in our season of navigation. It may happen, too, that a vessel from Europe may visit us, owned in England or France; such a vessel is not enrolled and licensed for the coasting trade, and is it for that reason alone beyond the jurisdiction of this court? Again, does the word state or territory, in the act of 1845, mean a foreign country? It seems to me clear that the act intends to speak only of the states and territories of the United States, because it refers to vessels and steamboats enrolled and licensed under their authority. The case of foreign vessels has been mentioned, because this court has not

[1] The Genesee Chief *vs.* Fitzhugh, 12 Howard, 458.

unfrequently had such cases before it, and considerable difficulty and embarrassment have been felt in acting upon such cases under the law of 1845, as well as in cases where the vessel was enrolled and licensed under the law, but employed at the time not in business of commerce and navigation between ports and places in different states and territories of the United States, but between one of the states and Canada, a foreign country. In the act of 1789, the jurisdiction of the district court is to include all seizures under the laws of imposts, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen within the district, and stress is justly laid on this clause by the court in the case of the *Genesee Chief*. We are beginning to have considerable foreign commerce in some of the ports of Lake Michigan, and it is not improbable that seizures may be made here. Is this law not still in force, or can there be no seizures unless the vessel is of twenty tons burthen or upwards, as is expressed in the law of 1845? It has been generally supposed that the act of 1845 was passed by Congress under the influence of the decision in the case of the *Thomas Jefferson* and subsequent cases founded on it, and with a view to avoid those decisions. It may safely be affirmed if Congress had thought the Supreme Court would make the decision that was made in the case of the *Genesee Chief*, the law of 1845 would not have been enacted. If the district courts already had general jurisdiction in admiralty on the lakes, why did Congress pass a law extending their jurisdiction? It should rather have been entitled an act limiting their jurisdiction. If the law of 1845 supersedes the law of 1789, then clearly, in this district and in all others that border on the lakes, and also possess navigable waters other than the lakes, there must be, in some respects, two different modes of administering admiralty law.

I confess, in view of these considerations, and many others that might be urged, I do not well see how we can administer admiralty law on these lakes, in many cases, without resorting to the law of 1789; and yet, to hold that to be in force, as well

as the law of 1845, leads to difficulties, which are apparent from an examination of the opinion of the court in the case of the *Genesee Chief*.

From the foregoing considerations, even if I were obliged to resort to the law of 1845 to sustain the jurisdiction of the court, I should be disposed to give it an extremely liberal construction, and to hold, whenever in a case of collision, either craft is within that law, and the circumstances bring it within the admiralty jurisdiction upon general principles of the maritime law, that this court can take cognizance. This case is within that rule. The Flora comes strictly within the provisions of the act of 1845. I therefore think the court has jurisdiction, and the motion to dismiss the case must be overruled.

This is believed to have been the first case declaring the doctrine that the admiralty jurisdiction of the District Courts, upon the western lakes and rivers, did not depend upon the act of Feb. 20th, 1845, and it is printed, unchanged, from the original manuscript of Judge Drummond.

The question of admiralty jurisdiction of the western lakes and rivers has since been much discussed, and it is believed that a historical view of the rulings of the Supreme Court may be of interest.

It had long been the doctrine that admiralty jurisdiction extended only as far as the ebb and flow of the tide, and did not exist at all upon the western lakes. The Thomas Jefferson, 10 Wheaton, 428; Peyroux *vs.* Howard, 7 Peters, 324; Steamboat Orleans *vs.* Phoebus *et al.*, 11 Peters, 175; Waring *et al. vs.* Clark, 5 Howard, 441; New Jersey Steam Navigation Company *vs.* The Merchants' Bank, 6 Howard, 344.

See also Genesee Chief *vs.* Fitzhugh, 12 Howard, 443; Fretz *vs.* Bull, Id., 466; Walsh *vs.* Rogers, 13 Howard, 283; Gibbons *vs.* Ogden, 9 Wheaton, 195.

In the case of Jackson *et al. vs.* Steamboat Magnolia, 20 Howard, 296, the Supreme Court held that the admiralty jurisdiction of the courts of the United States extends to cases of collision upon navigable waters, although the place of such collision be within the body of a county, and above the flux and reflux of the tide, and this by virtue of the Judiciary Act of 1789, and not from the act of 1845.

This ruling was made by a divided court, three of the justices dissenting, and Justices Daniel and Campbell delivering elaborate opinions, protesting against the doctrines asserted by the majority, as a usurpation on the part of the judiciary and a violation of rights reserved by the Constitution.

The case of Allen *et al. vs.* Newberry, 21 Howard, 244, decided that admiralty had not jurisdiction of a contract for shipment of goods between ports of the same state.

In Nelson *et al. vs.* Leland *et al.*, 22 Howard, 48, jurisdiction was sustained in a case of collision on the Yazoo River, two hundred miles above its confluence with the Mississippi, Justices Campbell and Catron dissenting.

The admiralty jurisdiction is not taken away by the fact that the collision or other tort was committed within the body of a county.

If the collision occurred on those navigable waters which empty into the sea, or into the bays and gulfs which form a part of the sea, the maritime courts have jurisdiction. The Propeller Commerce, 1 Black, 574.

The Eagle, 8 Wallace, 15, is a leading and well considered case. The court there ruled that the district courts can take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea; that it is not necessary, in a libel on the lakes, to bring the case within the act of 1845; but on the contrary, this act, instead of being an extending and enabling act, as was intended, having become, in consequence of the decisions of this court, inoperative, must be regarded as obsolete and of no effect; and that the saving clause, as to the concurrent remedy at common law, is also of necessity useless and of no effect.

It was further held, that the ninth section of the Judiciary Act of 1789, conferring upon the district courts exclusive original cognizance of all civil causes of admiralty jurisdiction, "including all seizures under laws of impost, navigation, or trade of the United States where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas," is also inoperative.

In Taylor *vs.* Carryl, 20 Howard, 583, and The Moses Taylor, 4 Wallace, 411, the question of state jurisdiction was fully discussed.

In the case of The Hine *vs.* Trevor, 4 Wallace, 555, some of the previous decisions are discussed. The rule is laid down that the act of 1845 is a limitation of the powers granted by the act of 1789, as regards cases arising upon the lakes and navigable waters connecting said lakes, and sums up the doctrines as follows:

1. The admiralty jurisdiction, to which the power of the federal judiciary is by the Constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States.

2. The original jurisdiction in admiralty exercised by the district courts, by virtue of the act of 1789, is exclusive, not only of other federal courts, but of the state courts also.

3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24th, 1789.

4. The admiralty jurisdiction exercised by the same courts, on the lakes and the waters connecting those lakes, is governed by the act of February 3d, 1845.

See also Fox *vs.* Revenue Cutter, 8 American Law Register (O. S.), 459; Cunningham *et al. vs.* Hall, 1 Clifford, 43; Great West No. 2 *vs.* Oberndorf *et al.*, 57 Illinois, 168.

The following are the reported decisions of the circuit and district courts on the subject of admiralty jurisdiction:

DeLovio *vs.* Boit, 2 Gallison, 398; Gloucester Insurance Company *vs.* Younger, 2 Curtis, 322; McGinnis *vs.* The Pontiac, 5 McLean, 359; Fox *vs.* Revenue Cutter, 8 American Law Register, 459; Western Transportation Company *vs*, The Great Western, 4 Western Law Monthly, 281; Franconet *vs.* The Backus, Newberry, 1; The Young America, Id., 101; The Bacon, Id., 274; The Jenny Lind, Id., 443; The Charles Mears, Id., 197; The Globe, 2 Blatchford, 427; Brooks *vs.* The Peytona, 2 Western Law Monthly, 518; Whitaker *vs.* Lorentz, Id., 520; Merritt *vs.* Sackett, 2 American Law Journal, 341; Page *vs.* The McDonald, 17 Legal Intelligencer, 310; Thackarey *vs.* The Farmer of Salem, Gilpin, 524; Wallis *vs.* Chesney, 4 American Law Register, 307; The Ann Arbor, 4 Blatchford, 205; Gillespie *et al. vs.* The Barge Leonard, 1 Chicago Legal News, 313; Cunningham *vs.* Hall, 1 Clifford, 43; Leonard *vs.* The Volunteer, 1 Chicago Legal News, 185; the Eli Whitney, 1 Blatchford, 360; United States *vs.* 269½ Bales of Cotton, 1 Woolworth, 236; The Mary Washington, 1 Abbott, 1; The Harrison, 2 Abbott, 74; The America, Lowell, 176; The Sarah Jane, Id. 203; The Island City, Id. 375; The A. R. Dunlap, Id. 350; The City of Norwich, 1 Benedict 89; Wright *vs.* The Norwich & New York Transportation Co., Id. 156; The Circassian, Id. 209; The Sailor Prince, Id. 234; The Adele, Id. 309; The Eledona, 2 Benedict, 31; The Antelope, Id. 405; The Norway, 3 Benedict, 163; The Leonard, Id. 263; The Missouri, Id. 508; The Transit, 4 Id. 567; The Hardy, 1 Dillon, 460; McAllister *vs.* Steamboat Kirkman, 1 Bond, 369; Steamboat Cheeseman, *vs.* Two Ferry Boats, 2 Bond 363; The Elmira Shepherd, 8 Blatchford, 341; Henry N. Wickes *vs.* The Steamboat Circassian, lately decided by Blatchford, J., Chicago Legal News, Vol. 5, p. 146.—[*Reporter.*

KUTER vs. THE MICHIGAN CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1853.

COMMON CARRIERS.

1. NOT BOUND TO CARRY MONEY.—A clause in the charter of a Railroad Company, requiring them to transport "all merchandise and property," does not oblige them to become common carriers of money.

2. Nor does the fact that they transport money for an express company under a special contract, make them such common carriers, and subject to extraordinary responsibilities as such.

Kuter vs. The Michigan Central R. R. Co.

3. DUTY OF SHIPPER TO DISCLOSE CHARACTER OF PROPERTY.—The general rule that the shipper is not bound to disclose to the carrier the kind, quality or value of the property, and that, in the absence of notice, or fraud or artifice on the part of the shipper, the carrier is liable, notwithstanding there was no disclosure, must be construed and applied subject to the usual course of business. If the property is put up or packed in a manner calculated to deceive the carrier, he does not become subject to extraordinary responsibilities as such; but if there is justly any doubt about the contents of a package, he should make inquiry.

4. SAME—WHEN CARRIER SHOULD MAKE INQUIRY.—An emigrant having packed and shipped a quantity of gold coin in the center of an ordinary dry-goods box, filled with clothing and household goods, *held:* If this was calculated to deceive the company as to the value of the contents, and by no reasonable inference could they have supposed that the box contained coin, they are not liable as common carriers. If, however, the defendants knew that parties emigrating, like the plaintiff, were in the habit of putting up valuable articles and money among their household goods, and from such knowledge might infer that the box of plaintiff might contain money, then it became their duty to make inquiry, in order to relieve themselves from liability.

5. LIABLE AS BAILEE.—In every case where property is delivered to a carrier, to be transported for hire, if the circumstances are such as to relieve him of his extraordinary responsibility as a common carrier there is still an implied contract for ordinary care.

Assumpsit for goods and money delivered to defendants, to be transported from Detroit to Chicago.

The first count alleges a delivery, specifying the articles, to defendants as common carriers.

The second, alleges a delivery of the property for transportation, to be delivered to plaintiff at Chicago within a reasonable time.

The third, alleges a general bailment.

The fourth, charges that the defendants were common carriers, and agreed to carry and deliver, etc.

Plea of general issue.

The plaintiff, in April, 1852, was moving with his family from Schuylkill county, Pennsylvania, to Kane county, in this state; and, on the evening before his departure, packed in an ordinary dry-goods box, which was well nailed and fastened, and bound with one iron and two wooden hoops, a quantity of clothing and various articles of household use, books, etc. In the middle of the box was placed a package of gold coin,

amounting to nearly eighteen hundred dollars, carefully wrapped in a handkerchief. The box arrived in Detroit in apparent good order and condition, and was there received by the agents of defendants, to be transported to Chicago. The plaintiff desired the box to go on the same train with himself and family, but was told that it could not, but that it would be in Chicago sooner than he; that they would send it that day. This was the 20th of April. The box never reached Chicago; indeed, there was not the slightest evidence in the case to show what became of it or its contents.

No question was made about the liability of the defendants for the value of the contents of the box other than the money.

The defendants were a corporation created by a law of the state of Michigan, in 1846. It was alleged as a ground of defense, that they were not common carriers of money; that their charter did not make them so; and that their agents were not authorized to receive money for transportation; that. in point of fact, this money was delivered to them, if at all, under circumstances calculated to deceive them, there being nothing about the box to indicate that there was in it anything of extraordinary value,—in fine, that it operated as a fraud on them, though none was intended.

I. N. Arnold & C. Beckwith, for plaintiff.

H. G. & E. S. Shumway, for defendants.

DRUMMOND, J., charged the jury as follows:

The first thing to be considered is as to the proper construction of the charter. By it they were required to transport all merchandise and property. It is insisted by the plaintiff's counsel that this includes money. Property is a word of very enlarged meaning. It comprehends ordinarily everything which is valuable and is subject to disposition and to protection under the law. But it is plain, in order to arrive at the true meaning of the legislature when using the word in this

charter, we must look at the connection and circumstances. What was the intent of the law? The state was chartering a railroad company to perform all the usual business and offices of such a company, and we must construe this law with reference to the subject matter of the grant. At the time this charter was granted, it was not incumbent, as a general thing, on common carriers of merchandise and property, to transport money. They might become carriers of money, undoubtedly, but this was considered out of the ordinary line of business, and subject to unusual risks, requiring corresponding care and compensation. The word property, as used in the charter, must certainly have some limitation. It did not include all kinds of property. We must understand the meaning to be such property as is usually carried on a railroad. If it had appeared by the evidence that it was the practice of railroad companies to transport all money offered, then it might be different. As it is, I think a fair interpretation of their charter would justify a refusal on their part to act as common carriers in the carriage of money. But if it be conceded that they are not obliged by their charter to be common carriers of money, there is no doubt they may become so by their acts,—they may hold themselves out to the world as carriers of money. It seems that the defendants did transport money for the express company, which, as well as all other property carried by the express company, was under the sole charge of a messenger of the latter company, and at their risk, under a special contract, which certainly greatly restricted the common law liability.

But that circumstance alone did not make them common carriers of money, and subject to the extraordinary responsibilities of common carriers of money.

If you shall believe the defendants were common carriers of money, and that no notice of any restriction or limitation of their liability was brought home to the plaintiff, then the plaintiff, subject to the qualification hereafter stated, was not bound to disclose to the defendants the contents of the box in order to render them liable; but if the defendants wished to

guard themselves against risk, they should have inquired as to the contents of the box.

As a general rule, a person who delivers to a carrier any article or property, of which the latter is a common carrier, is not bound to disclose the kind, quality or value of such property, and the carrier, in the absence of notice, or fraud, or artifice on the part of the person making the delivery, is liable notwithstanding no disclosure is made. But this rule must be taken and applied subject to the usual course of business, and this is a very important qualification of the rule itself. If, in point of fact, the property is put up or packed in such a manner as is calculated to deceive the carrier, then he does not become subject to the extraordinary responsibilities of a common carrier. But if there may be justly any ambiguity or doubt about the contents of a package or box, resulting from its examination or appearance, then the consequences of such doubt must fall upon the carrier, if he do not make inquiry. The thing must be calculated to deceive, and if you believe that it was contrary to the usual course of business for money to be packed in the way proved in this case; that it was calculated to deceive the defendants as to the value of the contents; or that it operated as a fraud upon the defendants, though none was intended,—then they are not liable as common carriers. And by "operating as a fraud," I mean that by no reasonable inference could the defendants suppose the box contained what was actually within it. It is upon this principle that common carriers of passengers are liable for the ordinary baggage of a passenger and the money for usual traveling expenses, which may be in a trunk, but are not liable for a sum of money beyond this limit, nor for merchandise found therein. If, however, the defendants knew, as is insisted they did, that parties emigrating like the plaintiff, were in the habit of packing up valuable articles and money among their household wares, and, from such knowledge, might infer that this box of the plaintiff's might contain money, then it was their duty to make inquiry, in order to relieve themselves from liability.

There is a count for a general bailment. If it be true that these defendants were not common carriers of money, or if there was any improper means or artifice made use of to conceal the value of the box, or to mislead, or to deceive the defendants, they might not be liable as common carriers; still, in every case where a party delivers to a common carrier an article of property to be transported to a particular place, for a certain sum, if there be any facts in the case which would relieve the carrier from the responsibilities of a common carrier, as by special contract, or notice, or concealment of the value of the article—actual fraud being absent—there is an implied contract on the part of the carrier to take due care of the property. This only changes the obligations of the carrier, and does not free him from all responsibility. He is still bound to the use of ordinary care. If in this case you shall believe that the defendants were not common carriers of money, or that this money was so placed as to mislead or deceive the defendants as to the value of the box and its contents, yet if you shall also believe that the defendants have been guilty of negligence, if they have not taken ordinary care of the box and its contents, then the defendants are liable for the loss. But if, on the contrary, you shall believe the defendants were not guilty of negligence, but exercised ordinary, reasonable care about the property,—and by ordinary care is to be understood such care and diligence as a prudent man exercises over his own property, supposing it to be what it purported to be from the general appearance and aspect of the box,—then they are not liable for the loss of the money. But if you shall believe there was an improper concealment of the value of the contents of the box, and this concealment was the cause of negligence, if any negligence existed, then the defendants cannot be held liable for what was the result of the act or conduct of the plaintiff.

It is admitted by the plaintiff's counsel that if you shall be of opinion that the defendants, as to the money, were mere ordinary bailees, it devolves upon the plaintiff to prove affirmatively that the defendants have been guilty of negligence.

Kuter vs. The Michigan Central R. R. Co.

Common carriers are not liable for the loss of money packed among other goods in a box, in such a way as to deceive and mislead them. If they are to be held liable, they should be told of its contents. Chicago & Aurora Railroad Company, *vs.* Thompson, 19 Illinois, 578.

A common carrier may qualify his liability by a general notice of any reasonable requisition to be observed as to the manner of delivery, entry of parcels, information of contents, etc. The May Queen, Newberry, 464.

But he cannot, by a general notice, limit, avoid or restrict the liability devolved on him by the common law, or the salutary grounds of public policy. Ibid.

In order to charge common carriers as insurers, they must be treated in good faith; concealment, artifice, or suppression of the truth, will release them of this liability. American Express Company *vs.* Perkins, 42, Illinois, 458.

Although a common carrier is answerable for the loss of a parcel, whatever its value, unless he make a special acceptance, if the consignor studiously conceal from the carrier, or misrepresent the value or nature of the goods shipped, the ship owner is not liable if the goods are purloined on the passage, but the wrong-doer would be. Relf *vs.* Rapp, 3 Watts & Sergeant, 21.

Labelling a box or trunk entrusted to a carrier as containing articles of a different nature and value from its real contents, will dispense with further inquiry as to its contents. Ibid.

A carrier of passengers is liable, if baggage be lost, though without the carrier's fault. Hawkins *vs.* Hoffman, 6 Hill, 586.

By "baggage" is not understood "money," unless it be for traveling expenses. Ibid.

A common carrier is liable for money stolen from a passenger's trunk, which was placed there by him for his personal use and traveling expenses; but not for what he put there to use in buying clothing. Hickox *vs.* Naugatuck Rail Road Company, 31 Connecticut, 284.

A gold watch and chain, and coin, are not deemed baggage, as between passenger and carrier. The Ionic, 5 Blatchford, 538.

See case of Woodward *vs.* Illinois Central Railroad Company, *post. pp.* 403, 447; also Citizens' Bank *vs.* Nantucket Steamboat Company, 2 Story, 16.

As to money carried in a trunk, see Orange County Bank *vs.* Brown, 9 Wendell, 85; Gibbon *vs.* Paynter, 4 Burrow, 2298; Batson *vs.* Donavan, 4 Barnewall & Alderson, 19.

Carrier is liable for a reasonable amount of bank bills carried in a trunk. Illinois Central Railroad Company *vs.* Copeland, 24 Illinois, 332; Merrill *vs.* Grinnell, 30 New York, 594.

Not, however, beyond what is necessary for personal expenses. Davis *vs.* Michigan Southern and Northern Indiana Railroad Company, 22 Illinois, 279; Hickox vs. Naugatuck Railroad Company, 31 Connecticut, 281. And *held* not liable even for that amount. Grant *vs.* Newton, 1 E. D. Smith, 95. This was, however, in an inferior court, and the rule has not been sanctioned by higher authority.

A watch properly carried in a trunk, Jones *vs.* Voorhees, 10 Ohio, 145; Pudor, *vs.* Boston and Maine Railroad Company, 26 Maine, 458.

As to limitation of responsibility, by notice or contract, see Farnham *vs.* Camdem, &c., Railroad Company, 55 Pennsylvania State, 53; Stedman *vs.* Western Transportation Co., 48 Barbour, 97; Prentice *vs.* Decker, 49 Barbour, 21; Limburger *vs.* Westcott, Ibid, 283; Belger *vs.* Dinsmore, 51 Barbour, 69; Betts *vs.* Farmers' Loan, &c., Co., 21 Wisconsin, 80; Boorman *vs.* American Express Co., Ibid, 152; Evansville, &c., Railroad Company, *vs.* Young, 28 Indiana, 516; American Express Co. *vs.* Sands, 55 Pennsylvania St., 140.

A passenger who has surreptitiously introduced into a coach an article of great value, for the purpose of getting it carried for nothing, cannot recover in case of loss. If, however, the carrier learns the fact, and charges accordingly for the article as extra baggage, he would then become liable. Hellman *vs.* Holladay, 1 Woolworth, 365.

Consult 2 Kent, 603; Angell on Carriers, §§ 115, 116; Story on Bailments, §§ 565–569; 2 Parsons on Contracts, 254, 255.—[*Reporter.*

THE CONGRESS.

District Court.—District of Wisconsin.—March Term, 1854.

In Admiralty.

1. General Average.—The court in admiralty will not entertain jurisdiction in cases of general average, unless all the parties in interest are before it.

2. Claim for Contribution only a Qualified Lien.—A lien created by the maritime law, as salvage, etc., is absolute and unconditional; but a claim for contribution is but a qualified lien, depending upon the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee.

3. The maritime law does not imply on the part of the owner receiving the goods a promise for contribution.

4. What Constitutes a Case for General Average.—To constitute a case for general average, three things must concur: A danger in which ship, cargo, and crew all participate—imminent and apparently inevitable, except by voluntarily incurring the loss of a portion to save the remainder; a voluntary jettison of some portion for the purpose of avoiding this common imminent peril; this attempt to avoid the imminent common peril must be successful.

This libel is for general average contribution. It propounds that the Schooner Congress, on a voyage from Buffalo to Milwaukee, having on board a miscellaneous cargo on account of various consignees, on or about the 24th November, 1853, encountered a storm on Lake Michigan, and on the 26th of the same month her masts and rigging were carried away, and she was entirely disabled; all her sails were gone but her mainsail, and that was badly split, and she came to anchor near the dock of the South Manitou Island, on or about the first of December; that during the storm, for the purpose of lightening the schooner, and saving the balance of the cargo and the vessel, a portion of the cargo stowed on deck was thrown overboard; that soon after said schooner was anchored, the master and crew left her, and departed for their homes, the first mate, William Blyburn, alone remaining in custody of the vessel and cargo.

That the libellant, having an insurance upon a part of said cargo, with the consent and at the request of the consignees, chartered the Propeller Rossiter, with a competent and skillful master and crew, to go to the relief of said schooner, and to secure the vessel and cargo. The said propeller proceeded to the vessel, and took on board a portion of the cargo, rigged the schooner with a new jury-mast, supplied her with men, and towed her fifteen miles into the lake, whence, with the aid of these men and the first mate, she proceeded to Milwaukee, her port of destination. The propeller brought in that part of the cargo put on board of her. That by this means so much of the cargo was saved to the owners; that the libellant expended $2087.75-100, which is alleged the proper subject matter of general average contribution upon the vessel, cargo, and freight, with the prayer of a decree for compensation and reward by way of general average contribution.

Finch & Lynde, for libellant.

J. Downer, for claimants.

MILLER, J.—Has this court, in admiralty, jurisdiction in cases of general average? and, if so, is this a case of general average?

In England, the court of admiralty has no jurisdiction in such cases.[1] That court has been confined in its jurisdiction by the common law courts. Such has not been the case in America. Under the Constitution of the United States, the district courts are vested with admiralty and maritime jurisdiction, and they have not been restricted within the narrow limits of the English admiralty.[2] But in the case of the *Constancia* a substantial requisite to the jurisdiction is asserted, that in all cases of average, it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in and pay their quota. The court of admiralty possesses no such power. It is very clear that this court would not entertain this jurisdiction unless all parties in interest were before it, for it could not adjust a general average, which is a proportionate contribution by all.

Jurisdiction has been entertained by the District Court for the Southern District of New York, in *The Mutual Safety Insurance Company et al. vs. The Cargo of the Ship Georgia*, 8 Law Reporter, 361, and in *The Packet*, 3 Mason, 255, by the circuit court of the first circuit. The court of admiralty has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law, such as seamens' wages, bottomry, prize, salvage, etc. In these cases the maritime law attaches an absolute and unconditional lien, and the possession of the property is not necessary to its validity. Such liens follow the vessel or cargo into whose hands soever they may pass by title or purchase from the owner.[3] But in general average, the party entitled to contribution has no absolute and unconditional lien upon the goods or property liable to contri-

[1] La Constancia, 2 Wm. Robinson, 487.

[2] Waring *vs.* Clark, 5 Howard, 441; The New Jersey Steam Navigation Company *vs.* The Merchants' Bank of Boston, 6 Id., 344; The Genesee Chief 12 Id., 443; Fretz *vs.* Bull, Id., 466; Cutler *vs.* Rae, 7 Howard, 729.

[3] Sheppard *vs.* Taylor, 5 Peters, 675.

bution. Possession may be retained until the general average with which the property is charged has been paid or secured. This right of retainer is a qualified lien, to which the party is entitled by the maritime law; but it depends on the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee. It does not follow the property into their hands, nor adhere to the proceeds. Upon receipt of the property by the owner, the law implies a promise that he will pay his contribution, as the owner is liable, because at the time he receives the goods, they are bound to share in the loss of other property by which they have been saved; and he is not entitled to demand them until the contribution has been paid. This promise is not implied by the maritime law, which gave the lien, but upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods. It is, for these reasons, decided, in *Cutler vs. Rae*, that a libel *in personam* for a contribution by way of general average, can not be sustained in the admiralty courts of the United States. In the conclusion of the opinion, the Chief Justice remarks: "Whether the court of admiralty might not have proceeded *in rem* to enforce the maritime law before the goods were delivered, is a question which does not arise in this case, and upon which, therefore, we express no opinion." From this remark a doubt as to the jurisdiction may be inferred. But as the courts are not limited in their jurisdiction as in England, I have little doubt but in cases wherein all interests are represented, the court in admiralty may decree contribution upon a libel for general average.

Now as to this case, I will not stop to inquire whether all the property bound to contribute has been libelled and is before the court or not. This case does not require this inquiry.

Salvage charges are deemed a general average when incurred for the benefit of all concerned. It is properly a charge apportionable upon all the interests and property at risk in the

voyage which derive any benefit therefrom. But still these charges may be a simple average or partial loss. The circumstances of the case are to be looked to, to ascertain whether they be the one or the other.[1] Salvage services are an unconditional lien upon the property saved, and all must contribute toward its payment. But we have stated that such is not so in cases of general average. The one is a claim for the preservation of property; the other is a claim of contribution for a loss, voluntarily sustained for the common safety. The latter can not be confounded with, or converted into the former. It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of a claim of general average. It is the safety of the property, and not the voyage, which constitutes the foundation of general average. This principle is decided in *Caze vs. Reilly*, 3 Washington, 298; *Sims vs. Gurney*, 4 Binney, 513; *Gray vs. Waln*, 2 Sergeant & Rawle, 229, and is sustained in the *Columbian Insurance Company vs. Ashby & Stribling*, 13 Peters, 331. This last case settles several principles upon the subject of general average, but not necessary to be stated here.

Bernard vs. Adams, 10 Howard, 270, settles the case under consideration conclusively against the libellant. The court in that case again adheres to the decision in the case of *The Hope*, 13 Peters, 331, and again affirms the decisions in *Caze vs. Reilly*, *Sims vs. Gurney*, and *Gray vs. Waln*. In the opinion by Mr. Justice Grier, it is stated that, "The law of general average has its foundation in equity. The principle that what is given for the general benefit of all shall be made good by the contribution of all, is recommended not only by its equity but also by its policy, because it encourages the owner to throw away his property without hesitation in time of need.

"In order to constitute a case for general average three things must concur:

"1st. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently inev-

[1] Flander's Admiralty, 284-5, and cases cited.

itable, except by voluntarily incurring the loss of a portion of the whole to save the remainder.

"2d. There must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern, for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

"3d. This attempt to avoid the imminent common peril must be successful."

It is not necessary to proceed further to show that the Commercial Insurance Company has not brought itself within these requirements. The libel does not present a case for general average.

See Dike *vs.* The St. Joseph, 6 McLean, 573; Campbell *vs.* The Alknomac, Bee, 124; Potter *vs.* Ocean Insurance Company, 3 Sumner, 27; Rea *vs.* Cutler, 1 Sprague, 135.

For an extended discussion of the law of general average and contribution, and full reference to authorities, see Parsons on Shipping and Admiralty, Vol. 1, p. 338, and *sequitur*.

Vessel and cargo in hold not liable to contribution for deck load jettisoned. Triplet *vs.* Van Name, 2 Cranch, C. C. 332; The Paragon, Ware, 322; Ray *vs.* The Milwaukee Belle, 18 American Law Register, 311, and in subsequent volume of these reports.

The loss must be voluntary. Sims *vs.* Gurney, 4 Binney, 524; Peters *vs.* Warren Insurance Company, 1 Story, 468; Arnold on Insurance, 881; 3 Kent, 232–240; Spafford *vs.* Dodge, 14 Massachusetts, 74.

Attempt must be successful. Williams *vs.* Suffolk Insurance Company, 3 Sumner, 510; Rossiter *vs.* Chester, 1 Douglas, 154; Scudder *vs.* Bradford, 14 Pickering, 13; Bradhurst *vs.* Columbian Insurance Company, 9 Johnston, 9; Whitteridge *vs.* Norris, 6 Massachusetts, 125; Sims *vs.* Gurney, 4 Binney, 513, 524

Sacrifice must be necessary. 3 Kent, 233; 1 Parsons on Shipping and Admiralty, 409, and authorities there cited.

It seems that if it were expressed in bill of lading that general average was to be paid, the person receiving the goods would be liable for contribution. Scaife *vs.* Tobin, 3 Barnewell & Adolphus, 523.

Owner's remedy against consignee is not lost by the latter's receiving the cargo at the port of necessity, and forwarding it himself to its destination. Sherwood *vs.* Ruggles, 2 Sandford, 55.

Master has a lien on all goods for their contributory shares. United States *vs.* Wilder, 3 Sumner, 308; Sherwood *vs.* Ruggles, 2 Sandford, 55; Gillett *vs.* Ellis, 11 Illinois, 579; Chamberlain *vs.* Reed, 13 Maine, 357; Dupont de

Nemours *vs.* Vance, 19 Howard, 162. The practice is for the captain to demand of the consignee an average bond before delivery of the goods.

This he has a right to do. Cole *vs.* Bartlett, 4 Louisiana, 130. See also Scaife *vs.* Tobin, 3 Barnewell & Adolphus, 523.

If by the neglect of the master the shipper loses the contribution to which he is entitled, the ship-owner is liable. Gillett *vs.* Ellis, 11 Illinois, 579.

In the case of Eckford *vs.* Wood, 5 Alabama, 136, the court ruled that if the master voluntarily part with goods which he is authorized to retain, and afterwards pay the contribution for which he could have retained them, an implied assumpsit is raised that he shall be repaid by the owner.

The Supreme Court, in the case of Cutler *vs.* Rae, 7 Howard, 729, decided that though the master had, by the maritime law, a lien upon the goods as security for the payment of their just contribution, that this lien was lost by their voluntary delivery to the consignee, and that the implied promise to contribute could not be enforced by an action *in personam* against the consignee in admiralty.

And in the case of Dupont de Nemours *vs.* Vance, 19 Howard, 162, the Supreme Court, referring to the former case say that this lien is put on the same footing as a maritime lien on cargo for the price of its transportation, which, it is well known, is waived by an authorized delivery without insisting on payment. —[*Reporter.*

THE RICHMOND.

DISTRICT COURT. — NORTHERN DISTRICT OF ILLINOIS. — APRIL TERM, 1854.

IN ADMIRALTY.

1. DELIVERY BY CARRIER MAY BE GOVERNED BY USAGE.—Long established, uniform, and well-known usage as to the mode of delivery by a common carrier, may be said to enter into the contract between the parties, and become the measure of their rights and liabilities.

2. WHERE HE SHOULD DELIVER, AND HOW.—The usage being established that in the case of a consignment of goods to a particular person, the owner or shipper could not require the carrier to deliver the goods in different parcels, an offer by the carrier to deliver all the goods, within a reasonable time and in proper business hours, at whatever place the owner or shipper might direct, discharges the carrier from his extraordinary liability.

3. DUTY ON REFUSAL OF CONSIGNEE TO RECEIVE.—If the consignee then refuses to receive the goods, the carrier can take charge of them himself, or store them with some proper person, and he then becomes an ordinary bailee, and is required to use only ordinary care and diligence.

There is a well known distinction between the liability of a common carrier, as such, and his liability after he has divested himself of that character.

4. SUBSEQUENT LIABILITY.—The carrier, having made a proper offer to deliver the goods, which was refused, and having then stored them in a warehouse which the next morning was burned, is not liable.

5. Where, after a proper offer to deliver, and a demand by the consignee that the goods should be delivered at different places, they were finally all landed together, the consignee insisting that the carrier should pay the drayage on the part which he wanted elsewhere, *it seems* that this was a delivery and acceptance, and the controversy was only as to payment of the drayage.

The libel in this case alleges that the libellant made a contract of affreightment with the captain of the schooner, by which the latter agreed, in August, 1851, to transport six tierces and one hundred and twelve hogsheads of sugar belonging to the libellant, of the value of eight thousand three hundred and thirty-nine dollars, from Buffalo to Chicago, and to deliver the same in good order to the libellant, dangers of navigation excepted; that the vessel did not deliver the sugar according to contract to the libellant at Chicago, but on the

contrary, against the consent, request, and remonstrances of the libellant, landed fifty hogsheads of the sugar at the dock of E. H. Haddock, in Chicago, and that shortly after the warehouse connected with the dock was burned down, and the fifty hogsheads of sugar were thereby totally destroyed.

The answer of the claimant admits the contract, but insists that the sugar was all delivered to the libellant at the wharf of E. H. Haddock, with his assent. It admits the warehouse was consumed, by which the sugar was destroyed, but declares that the fire was not the result of negligence on the part of any one. The answer further states that the captain of the vessel offered and was ready to deliver the sugar to the libellant at any place he might designate; that he requested the captain to deliver all the sugar, except about twenty casks, at the warehouse of A. T. Spencer & Co.; that after the vessel was ready to deliver the sugar at that warehouse, the libellant directed the sugar to be delivered at the dock of E. H. Haddock, and it was accordingly so delivered and received by the libellant; that the captain offered to deliver the entire consignment at any place the shipper might direct, but refused to divide it and deliver part at one place and part at another; that by universal and general custom the carrier could not be required to discharge a part of one consignment of goods, made to the same person, at different places in port.

The evidence shows that the vessel arrived in the port of Chicago on the 22d of August, 1851, and that the sugar was landed at the wharf of E. H. Haddock the next day, and that by nine o'clock on the evening of the 23d the sugar was all stored in the warehouse of Mr. Haddock, except a few casks (not the subject of controversy in this case), which were moved by the libellant to his own warehouse while the vessel was unloading. On the morning of the 24th of August the warehouse was destroyed by fire and the sugar lost. The warehouse was connected with the wharf.

At the date of the shipment and the delivery of the sugar at Chicago, the libellant occupied a warehouse on the wharf, on the margin of the river. No bill of lading was ever signed.

Grant Goodrich, for libellant.

H. F. Waite, for respondent.

DRUMMOND, J.—In the case of foreign vessels arriving in this country, it has been held that it is not necessary for the carrier to deliver the property shipped to the consignee personally, but to deliver it at the usual wharf, or at any proper place of landing, with reasonable notice to the consignee, will be sufficient. It is considered in such cases that the undertaking of the carrier is simply to convey from port to port. But this rule has been thought not to apply to the delivery in the coasting and internal trade of the country, but that in the absence of a special contract or well known usage to the contrary, the carrier is obliged to make an actual delivery. It has, however, been decided by some respectable courts that in the coasting trade it is sufficient to land the goods at any wharf or place generally used for that purpose, and give notice to the consignee, and that the carrier is not required to take them where the shipper may direct. It is certain, however, there are many cases in England and in this country which make a distinction between the foreign and inland trade, and which have adopted a much more stringent rule as to the delivery of goods by the carrier in the latter trade. Without examining how far there may be any sound reason for this distinction on principle, there can be no doubt that the usage or custom of a particular place or particular trade may, to some extent at least, reconcile the cases, because that is always an important element in determining whether the carrier has discharged his duty in the delivery of the property. Long established, uniform, and well known usage, as to the mode of delivery, may be said to enter into the contract between the parties, and becomes the measure of their rights and liabilities. Hence, different rules have sprung up, which the courts have sanctioned, between different kinds of carriage. Carriers by land are usually required to deliver the property to the owner personally or where he may direct. One class of carriers by land — railroads — do not generally send

the property away from their depots. Carriers by water are not always required to make a personal delivery. The evidence clearly establishes this usage on the lakes and in the port of Chicago. Where there is a consignment of goods to a particular person, the owner or shipper cannot require the carrier to deliver the goods in different parcels — in other words, the carrier may insist upon delivering the whole consignment at one place. This seems to me to be a reasonable and proper usage, and one which the court ought to sustain. The testimony shows that in fact consignments have sometimes been divided by carriers, but most of these exceptional cases have stood upon some peculiar circumstances, and in all of them it appears to have been optional with the carrier. These can not be said to affect the general custom. Whenever the shipper makes a special contract with the carrier as to the delivery of the goods, such contract would render the custom inoperative. In the absence of a special contract, I think it would require the clearest and most satisfactory proof of a well established and well known custom to divide consignments, to warrant the court in holding that it was the duty of the carrier to make such divison on the claim of the shipper. It seems to me that if the carrier delivers or offers to deliver the goods to the consignee at one place, that is in law a good delivery, and discharges the carrier as carrier. There having been no bill of lading in this case, the rights and liabilities of the parties must depend upon the general principles of law applicable to such case.

It is not necessary to determine in this case whether a delivery at the usual wharf of the carrier (the libellant having one of his own), with notice thereof, is sufficient even in case of a usage to that effect, because the carrier here declares that he was ready to deliver the sugar at any place pointed out by the shipper, and that in fact the delivery was at the wharf of Mr. Haddock, with the consent of the shipper.

There is a well known distinction between the liability of a common carrier, acting as such, and his liability after he has divested himself of that character, though he may still have

the custody of the property. In the latter instance, he is only held to the exercise of ordinary care and diligence. If the sugar were in the custody of the party actually or constructively, as a common carrier, he would, upon well settled principles, be liable for the loss in this case, though produced by an accidental fire. The question to be determined, then, is whether the connection of the owner of the vessel as a common carrier of the property had ceased, or was there a delivery of the sugar to the libellant.

The libellant paid the freight to the carrier, but as the payment was made on the 22d of August, while the sugar was yet in the vessel, and it was made before it was due, and was so understood by both parties, it cannot influence the question. Let us now ascertain what are the facts touching the delivery, as established by the evidence.

A witness in the employ of Mr. Dunham states that he was in the office of the libellant when the captain of the schooner came to ask where the sugar was to be delivered. The libellant said he wanted a part of the sugar—forty or fifty hogsheads—delivered at a storeroom on the river, adjoining his own warehouse. The remainder he wished to be delivered at a warehouse below, Spencer's, he thinks. The witness does not recollect that the captain made any reply or any objection. Another witness, who was in the employ of the libellant, declares that the libellant told him to go and say to the captain that he must deliver fifty or sixty hogsheads at his own dock. An officer of the schooner, whether captain or mate the witness did not know, refused to do it. The witness returned to the libellant, and the latter sent him back to forbid the captain to land the fifty or sixty hogsheads of sugar at Mr. Haddock's wharf, and to request him to bring them to his own dock. This the officer declined to do.

The captain testifies that he went to the libellant to ascertain where the sugar was to be landed. He said he would have it landed at Mr. Spencer's, with the exception of twenty or twenty-five hogsheads, which he wanted at his own dock. The captain replied that he would land the sugar at any one dock, but he

would not deliver it round in different parcels. At this time the schooner was in the river abreast of the libellant's dock, and the captain said to him that if he wanted all the sugar delivered there, he was ready to deliver it. The libellant told the captain "to haul down to Spencer's, and he would see," and that the vessel would have to pay the drayage. After the schooner hauled down to Mr. Spencer's dock, it was ascertained that there was no room in his warehouse. The captain returned with the information to the libellant, who directed him to unload at the wharf of Mr. Haddock. This occurred on the morning of the day the sugar was landed. The captain had various interviews with the libellant, and in them all the latter objected to the unloading of the whole sugar at Haddock's, and insisted the vessel would have to pay the drayage on what he wanted at his own warehouse. There are several witnesses who confirm the captain's statement as to some facts touching the delivery. For instance, the libellant told different persons that he should require the vessel to pay the drayage on that part of the sugar which he wished landed at his warehouse, if it was unloaded at the warehouse of Mr. Haddock. Various reasons were given by the witnesses why the consignment could not be divided, but it is not necessary to advert to them. Mr. Dyer testifies that he was in Mr. Haddock's office when the libellant came in and requested Mr. Haddock to store some sugar for him. He thinks the quantity named was one hundred hogsheads or more—his impression is one hundred and twelve. The libellant left the office to ascertain where the sugar was to be stored. Mr. Haddock states he does not recollect the number of hogsheads which the libellant wished stored. While the vessel was unloading, a few of the casks burst open, and the libellant removed the sugar which they contained to his own warehouse. There are a great many other details given by the witnesses connected with the delivery, but the foregoing may be said to be the pith of the testimony on that point, and I think there is great reason for saying that these facts make out a delivery of the goods at Mr. Haddock's dock, with the assent of the libellant; that

notwithstanding he in words objected to landing a part of the sugar there, yet by his acts and conduct he acquiesced and accepted the whole, and that the controversy between the parties was narrowed down to a question as to who should pay for the drayage of the part the libellant desired to be delivered at his own wharf.

But I do not consider it necessary to place the decision exclusively on this ground. I go further and hold, if the libellant had never acquiesced in the delivery at Mr. Haddock's, the party would nevertheless have been discharged from his responsibility as a common carrier. If the captain offered, within a reasonable time and in proper hours of business, to deliver all the sugar at the libellant's dock, or wherever else he should direct—and this fact can not be successfully controverted under the evidence—and the latter declined to receive it all there, or did not designate the place where it all was to be landed, then the carrier, in the absence of any uniform or well known usage to the contrary, upon landing the sugar at some suitable place, and giving notice to the consignee, was discharged from his extraordinary liability. In such case, if the consignee refuse to receive the property, the carrier can take charge of it himself, or store it with some proper person, and in either event the party becomes an ordinary bailee for the consignee or owner of the property, and is required to use only ordinary care and diligence concerning it—such care and diligence as a prudent man exercises over his own property.

If, then, the libellant had done and said nothing to manifest an acquiescence in the delivery at the wharf of Mr. Haddock, but had resisted it to the utmost, and, in fact, had declined to receive the goods, still the captain, having made an offer, under reasonable circumstances, to deliver them according to the direction of the shipper, and that offer being declined or not accepted, and the property actually delivered to a proper person, in a proper place, in no aspect can it be considered in the custody of the party as a common carrier. If the sugar was not in the possession of the libellant or his agent, it was in the possession, actually or constructively, of the carrier as

a common bailee, and he was responsible only for the exercise of ordinary care; and it being conceded the fire was accidental in this case, the carrier is consequently not liable for the loss of the sugar or any part of it.

The libel must be dismissed, with costs.

When a custom is so proved as to leave no doubt of its existence, it becomes a part of the law, and the court will so declare it, without requiring it to be again proved. Consequa *vs.* Willings, Peters' C. C., 225.

The local usage of a particular foreign port will govern as to the time of delivery under a bill of lading. Higgins *vs.* United States Mail Steamship Company, 3 Blatchford, 282; Broadwell *vs.* Butler, 6 McLean, 296.

As to effect of custom and how established, see further Bouvier's Law Dictionary, Vol. 1, p. 417.

If consignee is not present to receive goods, they should be properly stored by the carrier.

If stored in warehouse owned by carrier, his liability as common carrier ceases, and that of warehouseman commences. Chicago and Alton Railroad Company *vs.* Scott, 42 Illinois, 132.

Under a bill of lading from a foreign port, the carrier is not bound to unlade at a place selected by the consignee. Vose *vs.* Allen, 3 Blatchford, 289.

He must unlade at a place which is good, safe, and proper, and a delivery there, with notice to the consignee, is sufficient. Ibid.

A carrier by water has a right to deliver the goods upon a wharf, at a proper hour, on a secular day, first giving due and reasonable notice to the consignee. Fisk *vs.* Newton, 1 Denio, 45; Richardson *vs.* Goddard, 23 Howard, 28; The Peytona, 2 Curtis, 21; House *vs.* The Lexington, 2 New York Legal Observer, 4; Blossom *vs.* Smith, 3 Blatchford, 316; The Eddy, 5 Wallace, 481.

Redmond *vs.* Liverpool, &c., S.S. Co., 56 Barbour, 320. *Contra*, The Ville de Paris, 3 Benedict, 276.

See also Kennedy *vs.* Dodge, 1 Benedict, 311; Price *vs.* Powell, 3 Comstock, 322; Salmon Falls Manufacturing Company *vs.* Bark Tangier, 1 Clifford, 396, and cases there cited by court and counsel.

Where the goods are not accepted by the consignee or owner, the carrier discharges himself from liability on his contract of affreightment by storing them in a place of safety, and notifying the owner or consignee that they are so stored. The Eddy, 5 Wallace, 481.

When the articles to be transported have arrived at their destination, and have been received and stored in a warehouse, which is owned by the carrier or by some other party, the duty of the carrier is terminated. If the goods are stored in a building owned by the carrier, the liability changes to that of warehouseman. Porter *vs.* Chicago and Rock Island Railroad Company, 20 Illinois, 407; Western Transportation Company *vs.* Newhall, 24 Illinois, 466.

For a particular discussion of the termination of a carrier's risk, see Story on

Bailments, § 538, and *sequitur*. Owners of Mary Washington *vs.* Ayres, 5 American Law Register (N. S.) 692.

Responsibility of carrier on Ohio river does not cease with landing upon the wharf and notice to consignee. Hemphill *vs.* Chenie; 6 Watts & Sergeant, 62.

For an extended discussion of the rights and duties of carrier and consignee, and particularly as to delivery, see Brittan *vs.* Barnaby, 21 Howard, 527.

To constitute a good delivery upon a wharf, there must be reasonable notice to the consignee that the goods will be so unladen. A knowledge casually acquired by the consignee that the vessel has arrived and will discharge at a certain wharf will not dispense with notice. The Middlesex, 21 Law Reporter, 14.

Under an ordinary bill of lading, delivery on a wharf is sufficient, provided due notice be given to the consignee, and the different consignments are properly separated and open to inspection, and a fair opportunity is afforded the consignee to remove the goods. The Santee, 2 Benedict, 519.—[*Reporter.*

NORTH vs. McDONALD.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL TERM, 1854.

ATTACHMENT.

1. JURISDICTION.—Where the defendant is a citizen of Illinois, and the plaintiff a citizen of another state, and an attachment writ is served upon property, and defendant personally served with process. this court can take cognizance of the case.

2. WHAT CONSTITUTES CONCEALMENT.—A man who leaves a place to avoid service of process, requesting false information to be given of his movements "conceals himself so that process cannot be served upon him" within the meaning of the attachment law of Illinois.

3. Circumstances authorizing the issuing of an attachment stated.

4. NO ISSUING OF PROCESS NECESSARY.—It is not necessary that process should be first issued, or that an attempt should be made by an officer to find him. It is sufficient if he so conceal himself that an attempt to serve process would be useless.

5. The concealment may be at a distance as truly as where he resides, and if it turn out that he was in another county, it is no objection that process was not issued to that county.

Attachment, with personal service, tried by the court.

Upon an affidavit alleging that the defendant concealed

himself so that ordinary process could not be served upon him, a writ of attachment was issued on the 11th of March, 1853, and on the 15th served on property of the defendant in DeWitt county, and on the 11th of April personally served on defendant. The defendant was a citizen of this state, a resident of Chicago, and had kept a store here, until immediately prior to the issuing of the writ. He had then transferred his stock to a brother who went into possession.

The evidence showed that defendant was largely indebted and embarrassed. The plaintiff was a resident of another state, and his agent came to Chicago about the 5th of March, made inquiry at the store for defendant, and was told by his brother and the clerks that he had gone to Joliet, but would return. He called every day for eight days, and was always told that he would probably be back the next day. On inquiry of other persons he learned that defendant had goods at Bloomington, but on going there he found that defendant had been there and had moved some goods further south. On his return he sued out this writ.

Another witness testified that he had, at that time, claims in his hands against defendant to the amount of four or five thousand dollars; was on the lookout for him, and passed his store almost every day; found him in once between February 22d and March 8th, thinks it was about the 7th of March, and requested him to pay one of the claims. Defendant refused, and said that he had disposed of his goods, and declined to state to whom, but said that his brother was the agent of that person, and that inquiry might be made of him. Witness, in the presence of defendant, asked the brother to whom the goods had been transferred, and he declined to state, but said that he might ascertain by going to the records. On examination of the records, witness could find nothing; called again the next day and was told that he would be in soon. On inquiry at the hotel where he boarded, was told that he had gone east. Mr. Maher, to whom, as it afterwards appeared, the goods had been transferred, told witness that defendant had gone to the junction on the Galena road. Witness called at the store

every day until March 20th; and sometimes one account and sometimes another was given as to defendant's absence.

Another witness who also had claims against defendant, called at the store on the 7th of March, and was told by defendant's brother that he had gone to Rockford and was expected back that night; called repeatedly for several days, and was at one time told by defendant's brother that he had received a letter from him at Sycamore; would not allow witness to see the letter or examine the books; on inquiring of persons living near was told that defendant had gone to Australia.

Defendant was an unmarried man, and had no dwelling house. He returned to Chicago on the 21st of March.

Defendant's brother called as a witness, admitted the various falsehoods told to different creditors, and stated that in fact his brother had gone to Bloomington to bring to Chicago the goods which they had at that place. He further declared that his brother left publicly and mentioned the circumstances.

H. G. & E. S. Shumway, for plaintiff.

N. B. Judd, for defendant.

Drummond, J.—The defendant being a citizen of this state and the plaintiff a citizen of another state, and as the attachment was not only served on property, but the defendant was also personally served with process, in accordance with the rule laid down in *Toland vs. Sprague*, 12 Peters, 300, and the act of Congress of March 14, 1848 (9 Stat. 213) this court can take cognizance of the case.

There is no doubt there must be an intentional concealment to avoid the service of process, and the question is did the intention exist in this case coupled with the actual concealment or avoidance.

The evidence might undoubtedly be more conclusive, but, after a careful examination, I have become convinced that the attachment properly issued. It is to be remarked that in the great majority of these cases, the evidence will consist of

various circumstances and incidents, none of which in themselves may be sufficient, but which, when taken altogether, produce the conviction as to the intention. Men, when they seek to avoid the service of process do not publicly announce their purpose, on the contrary, they would be more likely to declare the reverse. We must judge from their acts, and it seems to me clear that these repeated falsehoods were not told by the clerks without the defendant's knowledge and instructions. The defendant was deeply embarrassed; creditors were calling on him daily and pressing their claims. He had transferred his goods. He left town suddenly without informing them where he was gone. His clerks, and particularly his brother, who had charge of his business, misled and attempted to deceive his creditors as to where he was. It appears to me that the facts warrant the belief that he left to avoid the service of process, and that he returned because of the service of attachments upon his property. If he left for that purpose, requesting false information to be given of his movements, he concealed himself, in my opinion, just as truly as though he had hid himself in a cave. Of course I do not refer to cases where a person leaves his home or place of business with the intent to depart from the state, or to remove his property out of the state, but to the case of a person concealing himself *within* the state which can be done as effectually at a distance as near at home.

It has been objected that a process should in point of fact have been first issued and an attempt made to serve it before the attachment would lie.

That part of the statute we are now considering authorizes an attachment to issue in case "such debtor conceals himself, or stands in defiance of an officer so that process cannot be served upon him." It comprehends two classes of debtors and in contradistinction—the debtor who conceals himself so that process cannot be served upon him, and the debtor who stands in defiance of an officer so that process cannot be served. The objection goes the extent of maintaining that there can be no other evidence of concealment except what follows or is at-

tended with attempted service of process. If this were the meaning it may well be asked why the statute has a double aspect. There may be some reason for saying that the last clause implies that the debtor must defy the officer that has the process, but however that may be, I think in the other case he is not required to conceal himself from an officer who has a writ, but to conceal himself so that the attempt to serve a process would be useless. If the rule were otherwise, a creditor would be obliged to follow a debtor into any county in the state where the latter concealed himself,—that is, he would be required to perform an impossibility—because the concealment implies the creditor does not know where to follow him,—and if it turned out afterwards that the debtor was concealed in a county different from his residence, or that where process was issued, it would always be a fatal objection to an attachment in this class of cases, that process was not issued against the defendant in the county where he was. Because the same argument would ever hold good, viz.,—*non constat*, but if process had been issued in the county where the debtor was, it might by possibility have been served on him. *Morgan vs. Avery*, 7 Barbour, 65–6; *Genin vs. Tompkins*, 12 Ibid., 265.

Issue and judgment for the plaintiff.

MATTISON vs. WALKER.

CIRCUIT COURT. — SOUTHERN DISTRICT OF ILLINOIS. — JULY TERM, 1854.

AUDITOR'S DEED AS EVIDENCE.

1. An auditor's deed is *prima facie* good, and is a title deducible of record within the meaning of section 11, chapter 66, Revised Statutes of Illinois.

2. When coupled with seven years' possession and payment of taxes, it is sufficient to protect a party who can connect himself with it.

Mr. Williams, for plaintiff.

Mr. Browning, for defendant.

McLEAN, J.—This is an action of ejectment, brought to recover the southeast quarter of section 14, 2 north, 5 west, in Adams County, patented to William Purdy, the 18th of November, 1837. Purdy and wife conveyed the same to Schuyler and Mattison, 1 June, 1852. This was plaintiff's title; possession of defendant was admitted.

The defendant claimed under a deed from E. C. Merry, auditor of the state of Illinois, to Robert H. Peebles, dated February 2, 1830, sale made the 14th of January, 1820, for the tax of 1827.

This proceeding was under the law of 1827. A deed from Peebles to Tillson was given in evidence, dated 27 June, 1830, recorded December 6th, 1830. Tillson conveyed to Russel Nevers, September 7th, 1830, recorded June 11th, 1831, and through mesne conveyances by a deed to Walker, the defendant, dated September 9th, 1847, under a contract of purchase, dated January 7th, 1840. The execution and delivery of this deed was proved, and also, that the defendant had been in the possession of the premises seven years, under his deed, before this suit was commenced. Tax receipts admitted.

The 11th section of the act of March 3d, 1845, that "no person who has or may have any right of entry into any lands,

tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such lands for non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record, shall make any entry therein, except within seven years from the time of such possession being taken; but when the possessor shall acquire such title after the time of taking such possession, the limitation shall begin to run from the time of acquiring title."

In the case of *Irving vs. Brownell*, 11 Illinois, 402, the court held that the auditor's deed to land, made in pursuance of a sale of land for taxes, under the law of 1827, will not show a complete title in a party without proof that the prerequisites of the law have been complied with.

The words claim and color of title made in good faith, under the law of 1839, mean such a title as, tested by itself, would appear to be a good *prima facie* title; such a title, connected with seven years' actual possession and payment of taxes becomes invincible.

An auditor's deed is a title deducible of record under the law of 1835, and is sufficient to protect a party who can connect himself with it and show that he has been possessed of the premises by actual residence under such title, for seven years.

That the facts bring this case within the 11th section of the above act, seems to be undoubted. His possession is protected, whether we regard the deed under which the defendant claims immediately, or the deed of the auditor under which he claims remotely. They are both *prima facie* good upon their face. The possession for seven years being proved, and also the payment of taxes during that period, this, as I suppose, gives a clear title, or at least, defense, under the statute and the decision of the Supreme Court, above cited.

The statute of limitation was intended to aid defective titles;—not a title defective upon its face, but a title *prima*

facie good upon its face, under which the defendant entered in good faith, and continued to occupy the land the term of time required.

Judgment for defendant.

As to validity of auditor's deed, consult Vance *vs.* Schuyler, 1 Gilman, 160; Thompson *vs.* Schuyler, 2 Id., 272; Hill *vs.* Leonard, 4 Scammon, 140; Irving *vs.* Brownell, 11 Illinois, 402; Messinger *vs.* Germain, 1 Gilman, 631; Wiley *vs.* Bean, Id., 302; Graves *vs.* Bruen, 11 Illinois. 431; Tibbetts *vs.* Job, Id., 453; Schuyler *vs.* Hull, Id., 462; Woodward *vs.* Blanchard, 16 Illinois, 425.—[*Reporter.*

AVERY vs. DOANE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—NOVEMBER TERM, 1854.

MARRIED WOMEN.

1. A married woman living with her husband and carrying on trade in her own name, cannot, in Wisconsin, become his debtor nor be garnisheed in proceedings against him.

2. It seems that she cannot hold, to the exclusion of her husband or his creditors, a stock of goods purchased upon credit, nor the proceeds or profits.

This proceeding was commenced by writ of attachment which was served on Sarah A. Doane, as garnishee. Her answer was taken before a commissioner of this court, wherein she states she is the wife of the defendant, Edgar P. Doane, and has been for eighteen years, and that she resides with her husband at Green Bay, where she is and has been engaged in the dry goods, millinery and fancy goods business for four years; that she carries on the business and buys goods in New York and Chicago in her own name, principally on credit. She also bought goods on credit out of her husband's store before he sold out and stopped business. She had a running account with her husband. When she com-

menced business at Green Bay her father purchased part of the goods amounting to four or five hundred dollars, and gave her some money as a present.

Her business has always been in her own hands, and she now gives her husband his board for his assistance and services.

The plaintiff's counsel moved the court to order an issue, to try her liability as garnishee under the statute, which motion was opposed by her counsel, upon the ground that being the wife of the defendant in the attachment suit, she is not answerable in this proceeding, under the circumstances disclosed in her answer.

Stevost & Bloodgood, for plaintiff.

H. L. Palmer, for defendant.

MILLER, J. There is no law in this state recognizing the custom of London, whereby married women may carry on the business of trade and merchandise as *femmes sole*, while cohabiting with their husbands. In some states *femmes covert* may carry on business as *femmes sole* in pursuance of statutes, while their husbands are engaged as mariners and absent from the country. This is the extent of legislation upon this subject in any of the states within my knowledge.

It is unnecessary to refer to authorities to prove, that at common law the husband is entitled to the goods and chattels of the wife, and also to all sums of money which she earns by her own skill and labor, and that these he has absolutely in his own right and not in hers. And if she purchases goods or property, during coverture, with his assent, and with the proceeds of her skill and saving, they become his at the moment of the purchase, and he becomes responsible for such as may be purchased upon credit.

It is contended that the act to provide for the protection of women in the enjoyment of their own property,—approved February 1st, 1850, chapter 44, changes the common law upon this subject. The third section of the act is as follows: "Any

married female may receive by inheritance or by gift, grant, bequest or devise from any person other than her husband and hold to her own and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits, in the same manner and with like effect, as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts."

The act provides more effectually for the protection of the wife's property by dispensing with the necessary intervention of trustees, than courts of equity had done, but it does not authorize the wife to hold to her own use, to the exclusion of her husband or his creditors, a stock of goods purchased by her on credit nor the profits or proceeds of trade. By the act she might have held to their exclusion the money given her by her father, but nothing more. That was property given her by a person other than her husband, which she by the act could receive and not be subject to the disposal of her husband, nor liable for his debts. The goods now in the store and the notes, accounts, and cash in hand she did not receive by inheritance, gift, grant, devise, or bequest from any person other than her husband or in any way known to this act.

The act changes materially the legal incidents of the marriage relation, but it has not extinguished quite all the marital rights of the husband. He is still entitled to the person and labor of his wife, and to the benefits of her industry and economy. The wife by the act is not degraded to the position of a hireling, which she would be if it authorized her to withhold from her husband the proceeds of her own labor, nor is she vested with authority over him, nor independence of him in her business transactions of trade, even if he, as in this instance, after disposing of his goods without paying his debts, should consent to become her servant for his board.

The defendant by voluntarily surrendering to his wife his marital authority in the control and business of his family can not compromise the legal rights of his creditors. He may consent to serve his wife in the store for his board, but the law

entitles him and his creditors to the goods and proceeds of sales.

The persons from whom she purchased goods upon credit with her husband's consent, cannot bring suit against her, but must resort to him for the recovery of their demands, although the charges in their books may be to her, or the notes signed by her alone.

As she cannot contract in business of trade in her own name while living with her husband, she can not sue or be sued in her own name upon transactions connected with the trade, nor be summoned as his garnishee. She can no more be his debtor in this particular than she can hold the goods in store or the avails of sales to the exclusion of him or his creditors.

The common law has wisely ordered that property acquired by the wife by purchase, with the consent of her husband, is in his possession and under his control, and the act under consideration does not disturb this provision, so essential to the peace and happiness of families.

The act of this state is copied from that of the state of New York, where a similar decision was made in *Lovett vs. Robinson & Whitbeck*, 7 Howard's Practice Reports, 105. And a similar decision of the Supreme Court of Pennsylvania, upon a similar law, is reported in *Raybold vs. Raybold*, 8 Harris, 308. In that case it is decided that the fact that real estate was paid for with the wife's earnings and savings, does not give her a trust estate in the property; but that money thus acquired is not the property of the wife within the meaning of the act relating to the estate of married women, but is the property of her husband.

For these reasons, the proceedings against Sarah A. Doane are dismissed, and the application for an issue is overruled.

The following are the decisions of the Supreme Court of Wisconsin on the questions involved. Conway *vs.* Smith, 13 Wisconsin, 125, where it is held that the statute gives married women as necessarily incident to the power of holding property, the power of making all contracts necessary and convenient for its enjoyment, and that such contracts can be enforced at law. Approved in Todd

vs. Lee, 15 Wisconsin, 365, where it is further held that she may become a sole trader and hold the profits of the business. Also approved in Leonard *vs.* Rogan, 20 Wisconsin, 540.

The earnings of a married woman, however, during coverture, are the property of her husband, and he can make no contract with her in relation to them; and where a woman had loaned her earnings to her husband, who to repay her had transferred to a trustee notes of third parties, the receiver of the husband's estate was held entitled to reduce the notes to possession and apply them in payment of his debts. Elliott *vs.* Bently, 17 Wisconsin, 591.

A married woman owning land in her own name may cultivate it by the labor of her husband and their minor children, and the products and proceeds are not liable to be taken in execution against him. Feller *vs.* Alden, 23 Wisconsin, 301.

Money placed by her in his hands to be invested for her, does not thereby become his property. Id.

Under a verbal agreement that the wife was to conduct the husband's business during his absence and have the avails as her separate property, her earnings still remain his property, and she cannot maintain an action on a note purchased by her with such earnings. Stimson *vs.* White, 20 Wisconsin, 562.

The following are the decisions in New York upon the questions involved under a similar statute, the Wisconsin statute being in most respects copied *verbatim* from it:

Sleight *vs.* Read, 18 Barbour, 159; Freeman *vs.* Orser, 5 Duer, 476; Smart *vs.* Comstock, 24 Barbour, 411; Coon *vs.* Brook, 21 Barbour, 546; Cropsey *vs.* McKinney, 30 Barbour, 47; Yale *vs.* Dederer, 17 Howard, Practice R. 165, S. C.; 21 Barbour, 286, S. C., 18 New York, 265; Commissioners of, &c. *vs.* Keller, 20 Howard P. R., 280; Berwick *vs.* Dusenberry, 32 Howard P. R. 348; Cramer *vs.* Comstock, 11 Howard P. R. 486; Klen *vs.* Gibney, 24 Howard P. R. 31; Sammis *vs.* McLaughlin, 35 New York, 647: Owen *vs.* Cawley, 36 New York, 600; Bass *vs.* Bean, 16 Howard P.R., 93; Vrooman *vs.* Griffiths, 1 Keyes, 53; Gage *vs.* Dauchy, 34 New York, 293; Abbey *vs.* Deyo, 44 Barbour, 374; Knapp *vs.* Smith, 27 New York, 277; Sherman *vs.* Elder, 24 New York, 381; Marsh *vs.* Hoppock, 3 Bosworth, 478; Manchester *vs.* Sahler, 47 Barbour, 155; Van Sickle *vs.* Van Sickle, 8 Howard, 265; Dillaye *vs.* Parks, 31 Barbour, 132; Buckley *vs.* Wells, 33 New York, 518; Lockwood *vs.* Cullin, 4 Robertson, 129; Longendike *vs.* Longendyke, 44 Barbour, 366; Whitney *vs.* Whitney, 49 Barbour, 319; Savage *vs.* O'Neil, 44 New York, 298; Merchant *vs.* Bunnell, 2 Keyes, 539; Kluender *vs.* Lynch, 3 Keyes, 361.

The following are the decisions of the Supreme Court of Illinois on a somewhat different statute.

Emerson *vs.* Clayton, 32 Illinois, 493; Bear *vs.* Hays, 36, Id. 280; Brownell *vs.* Dixon, 37, Id., 197; Elijah *vs.* Taylor, 37, Id., 247; Farrell *vs.* Patterson, 43 Id., 52; Streeter *vs.* Streeter, 43 Id., 155; Cole *vs.* Van Riper, 44 Id. 58; Manny *vs.* Rixford, Id., 129; Schwartz *vs.* Saunders, 46 Id., 18; Wortman *vs.* Price, 47 Id., 22; Sweeney *vs.* Damron, 47 Id., 450; Pierce *vs.* Hasbrouck, 49 Id., 23; Snider *vs.* Ridgway, 49 Id., 522; Carpenter *vs.* Mitchell, 50 Id., 470; Dean *vs.*

Bailey, 50 Id., 481; Dyer *vs.* Keefer, 51 Id., 525; C. B. & Q. R. R. Co. *vs.* Dunn, 52 Id., 260; Pike *vs.* Baker, 53 Id., 163; McLaurie vs. Partlow, 53 Id., 340; Haines *vs.* Haines, 54 Id., 74; Wilson *et al vs.* Loomis *et al*, 55 Illinois, 352; Thomas *et al vs.* City of Chicago, Id. 403.

Also the following cases recently decided: Cooksen *vs.* Toole, January Term, 1871, Chicago Legal News, vol. 5, p. 184. Hooker *vs.* Boggs, Id., 195; Parent vs. Callerand, June Term, 1872, Id., 159; Schmidt *vs.* Post. Id., 196—these will probably appear in 56th and 57th Illinois.

See also *in re* Kinkhead, U. S. District Court, Northern District of Illinois, January Term, 1873, opinion by Blodgett, J., to appear in subsequent volume of these reports.

The U. S. Supreme Court has also lately passed on the New York Statute, Voorhees, Assignee, &c. *vs.* Bonesteel, December Term, 1872, Chicago Legal News, vol. 5, p. 241.—[*Reporter.*

STATE OF MARYLAND, *ex rel.* PARTRIDGE, ADMINISTRATOR, &C., *vs.* TODD.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER TERM, 1854.

STATUTE OF LIMITATIONS.

1. IN MARYLAND RUNS AGAINST ABSENTEES.—Suit on an administrator's bond executed in the state of Maryland; plea that by the laws of Maryland no suit could be maintained on such a bond after the expiration of twelve years from the time it was executed. Replication that defendant removed from Maryland to Indiana before the twelve years had expired and before the suit was barred. Demurrer to this plea.

Held: There being no provision in the law of Maryland suspending the operation of the statute as to non-residents or absentees, the removal of the defendant made no difference.

2. HOW ITS OPERATION SUSPENDED.—The operation of the statute, after it commences to run, can only be suspended by positive law, and if the time expires while the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right.

3. EFFECT OF INDIANA STATUTE.—The statute of Indiana on this subject, passed in 1852, gives full effect to the statutes of other states, and places debtors removing here in precisely the same condition in which they are placed by the law of the place which governed the contract.

4. RELEASE BY ADMINISTRATOR.—Plea setting up a release from the former administrator, without showing that full payment was made, is bad, it being a general principle that an administrator can not release or compromise a debt, except upon full payment.

5. Plea of *non damnificatus* can only be pleaded to indemnifying bonds.

David McDonald, for plaintiff.

I. G. Marshal & W. McKee Dun, for defendant.

HUNTINGTON, J.—This action is founded on an administrator's bond, executed in the state of Maryland, in 1835, the present defendant being one of the sureties in the bond.

The declaration contains five counts. The first sets up a bond and condition, and assigns three breaches. The other counts are on the penal parts of the bond only.

There have been thirteen pleas filed, only part of which is it necessary to mention.

The eighth plea sets up the Maryland statute of limitations, which limits suits upon administrators' bonds to twelve years "after the bond is passed," that is, after it is approved.

To this plea the plaintiff replies, that the suit was not barred when the defendant left Maryland, and came to Indiana to reside. To this there is a demurrer; and this brings up the really important question in the case.

It is said that the statute of limitations of the state of Maryland has no force here, except so far as our own statute of 1852 gives it force.[1]

The general doctrine, that "the recovery must be sought and the remedy pursued within the times prescribed by the *lex fori*, without regard to the *lex loci contractus*, or the origin of the cause," is not without its exception; at least there is, says Judge Story, a distinction to be observed which deserves consideration. For example, where the *lex loci contractus* declares the debt extinguished, or a nullity, after the lapse of a certain period; and after the expiration of that period, the debtor removes into a jurisdiction which has a longer period of prescription,

[1] See Story's Conflict of Laws, §§ 581, 582.

or in which there is no prescription at all; in that case there can be no doubt, according to modern authorities, that the suit is barred.[1]

Quære. Is not a statute extinguishment *lege loci* equally effectual? And if not, upon what principle is it not? In the one case the right is extinguished, in the other the remedy. This is the distinction in the books, and has always appeared to me to be a distinction without a difference; for in both cases the intention of the legislature was to deny to the creditor the right, after the lapse of a certain time, to collect his debt.

But the replication sets up the fact that Todd, the defendant, left the state of Maryland before the twelve years had expired, and this is the ground on which the plaintiff rests his right to recover. Does this make any difference? Could Todd, were he now to return to Maryland (having removed from there before the twelve years had expired), be sued upon this bond? Clearly he could not; for there is no provision in the statutes of Maryland which suspend the operation of the statute as to non-residents and absentees. If the debtor was in the state when the statute commenced running, and in this case the statute commenced to run when the bond sued on "was passed," according to the language of the law—that is, when it was approved and filed by the proper authority. It could only be suspended by positive law, and there being no law suspending the operation of the statute as to absentees, etc., it continued to run.

If the time limited by statute expires while the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right.[2]

In this case, without reference to the statute of 1852, passed by our own legislature, it would be doubtful, upon principle, whether a suit could be maintained on this bond. But, it seems to me, this statute relieves the case of all difficulty. This is the provision, 2 Vol. Revised Statutes, 1852, page 77:

[1] Story's Conflict of Laws, §§ as above.

[2] McKinney *vs* .Springer, 8 Blackford, 506; Ogden *vs*. Blackledge, 2 Cranch, 272.

"Where a cause has been fully barred by the laws of the place where the defendant *resided*, such bar shall be the same defense here, as though it had arisen within this state." No argument or exposition can add clearness to this simple provision. If it means anything, it means to give effect to the statutes of other states in regard to the remedy upon contracts made under and governed by their own domestic policy—to place debtors removing here in precisely the same condition in which the law which governed the contract and the remedy placed them; and it seems to me that this is not only law but justice.

It was deemed sound policy in Maryland to enforce a prompt settlement of decedents' estates, and they have extinguished the right to sue on administrators' bonds after the lapse of twelve years, and it will be perceived that, in this particular, this class of obligations differ from all others known to the Maryland laws.

In *Horton vs. Horner*, 16 Ohio, 145, decided in 1847, this same doctrine was maintained. The Ohio statute is similar, viz: "That all actions founded on a contract, made between parties resident without this state at the time the contract was made, and which are barred by the laws of such state, shall be barred when brought in this state." The facts of that case were, that one of the parties was actually a citizen of Ohio; but the contract was made in New York, and the court held that he was a "resident" of another state, within the meaning of the statute.

Assuming, then, that by the laws of Maryland, where the contract was made, this suit would be fully barred, it follows that it cannot be maintained here. The demurrer, therefore, to the replication to the eighth plea is sustained.

For a discussion of the statute of limitations, and the principles of the *lex fori*, see opinion of Story, J., in Le Roy *vs.* Crowninshield, 2 Mason, 151.—[*Reporter.*

WOOD vs. DENNY.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—AUGUST TERM, 1855.

RULE OF DESCENT.

A testator bequeathed a certain sum of money to a person in trust, to invest in lands in Wisconsin, in the names of six grandchildren, to be conveyed to and vested in them in fee simple, directing that in case of the death of any of said grandchildren, the share of the child so dying shall go to and vest in his or her surviving brothers or sister. After the lands were purchased, and deeds made conveying them in fee simple to the grandchildren as tenants in common, one of the grandchildren died intestate, unmarried, and without issue. The undivided interest of deceased in the lands passed, by the laws of Wisconsin, to the grandchild's father, and was subject to levy and sale for the father's debts.

The will of Dr. Gideon Jaquex, of the state of Delaware, contains the following provisions:—"I give and bequeath unto my friend, John S. Newlin, of the city of Philadelphia, the sum of three thousand dollars, upon this special trust—that is to say, to invest the said sum of three thousand dollars in the names of my granchildren, Edward Denny, Gideon J. Denny, Henry Denny, Martha Anne Denny, Alfred Denny, and Oswald Denny, in the purchase of lands in the territory of Wisconsin, and to be conveyed to and vested in my said grandchildren in fee simple. And it is my mind and will, and I do hereby declare and direct, that in case of the death of any, or either, of my said grandchildren, the share of the child so dying shall go to and vest in his or her surviving brothers or sister."

The lands were selected and conveyed in fee simple to the said grandchildren as tenants in common. Subsequent to such conveyances, Oswald Denny, one of the said grandchildren, died intestate, and in his minority.

Charles G. Denny, the defendant, against whom this judgment was rendered, is the father of said grandchildren. The question presented on this motion to set aside the marshal's

sale is, whether the undivided share of Oswald Denny, deceased, in the lands so selected and conveyed, is subject to sale under execution issued on this judgment.

Mr. Jason Downer, for plaintiff. The provision relates to the death of the testator, or, at most, to the execution of the will. 2 Jarman on Wills, 621. The trust was completed and executed by the purchase of the lands. Jarman on Wills, 660, 661; *Moore vs. Lyons*, 25 Wendell, 119; *Earl et al. vs. Grim*, 1 Johnson's Chancery R., 494; *Murray et al. vs. De Rottenham*, 6 Johnson's Chancery R., 54.

Mr. D. A. J. Upham, for defendant, cited the following authorities:—4 Kent, 533; 2 Jarman on Wills, 449, 452, 456; *Defflis vs. Goldschmidt*, 19 Vesey, Jr., 566, 534; *Hulburt vs. Emerson et al.*, 16 Massachusetts, 240; *Stones vs. Heurtly*, 1 Vesey, Sr., 165; *Morton vs. Morton et al.*, 8 Barbour, 18; *Daniell vs. Daniell*, 6 Vesey, Jr., 297; *Cutter et al. vs. Doughty et al.*, 23 Wendell, 513; *Newton vs. Ayscough*, 19 Vesey, Jr., 534.

Miller, J. This is an absolute and unrestricted bequest of three thousand dollars to John S. Newlin, in special trust, to be vested by him in lands in Wisconsin, in fee simple, in the names of the testator's grandchildren. Upon the decease of the testator the grandchildren become vested as *cestuis que trust*, and clothed with power to compel in equity the execution of the trust. It is of little moment whether the provision of survivorship relates to the event of the decease of a grandchild or grandchildren in the testator's life time, or before the execution of the trust, as Oswold Denny died after the trust was fully executed. But it may be well to remark, that the law seems to be settled, that where the bequest is absolute and unrestricted, provisions such as this one, unlimited as to time, are construed to make them provide against the event of the legatee dying in the lifetime of the testator. Courts have seized with avidity upon slight expressions or circum-

stances, so to construe such provisions, to prevent a lapse, and also to avoid a restraint of alienation.

The word *share* must refer to the money, the subject of the bequest. And the words *go to and vest in*, are more appropriate for passing the money, than real estate, particularly as the will appears to be drawn with legal precision. The bequest is to be construed, as if the testator had directed that the trustee shall make the investment in lands in Wisconsin, in the names of such grandchildren as may survive him, or as may be living at the time of the investment, immaterial which in this case.

The money was directed to be invested in lands in the names of the grandchildren in fee simple. But if the provision of survivorship were construed to relate to the lands, the grandchildren would not become vested of an estate in fee. The technical words of the will should be construed according to their legal meaning. It would not do for the court to attempt by construction to mould the fee, so as to give effect to a conjectural intention. The testator did not direct that the fee should be defeasible throughout the entire life of the grandchildren.

The lands were conveyed to the grandchildren as tenants in common in fee simple; but there was no obligation resting on the trustee to accept joint conveyances. Six tracts or pieces of land might have been selected and purchased for the consideration of five hundred dollars each, and a conveyance might have been made of a tract in severalty to each grandchild. If the will had directed that the conveyances to the grandchildren should be as tenants in common of the lands, possibly there might be some plausibility in the argument that the word *share* should apply to the lands as well as to the money. If the lands had been conveyed to the grandchildren in severalty, there would not be anything to which the word share could be applied. The lands are not *per se* the subject of a limited or conditional bequest, but they are an absolute and unconditional investment in fee simple of a bequest. The grandchildren became seized in fee of the lands

by virtue of the deeds of conveyance to them in their own names, not by devise under the will. When the conveyances were delivered to the grandchildren, including Oswald, the trust was fully executed, according to the directions of the will, and the office and duties of the trustee ceased. In executed trusts, whether by deed or will, the rule of law must prevail. The deeds conveying the lands to the grandchildren as tenants in common in fee simple, were in conformity to the directions of the will, and also according to the laws of this state. By Section 44, of Chapter 56, Revised Statutes, page 317, all grants and devises of lands made to two or more persons, except as provided in the following sections, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

Oswald Denny having died intestate, seized of an estate in fee simple, without living issue or a widow, by the law of Wisconsin, his share in the lands descended to his father; and being thus vested in Charles G. Denny, the defendant, they became subject to sale under execution on this judgment.

THE J. W. BROWN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1855.

IN ADMIRALTY.

1. BILL OF LADING—OPEN TO EXPLANATION.—A bill of lading is as between the original parties in the nature of a receipt, and is open to explanation. The respondents are not estopped from setting up a mistake, and that the property receipted for was not all delivered to them.

2. WHEN CARRIER NOT LIABLE FOR DEFICIENCY.—The respondents, having satisfactorily shown that the whole of a cargo of wheat received by them was actually delivered to the consignee, are not liable for a deficiency from the amount receipted for in the bill of lading.

3. NO ESTOPPEL BETWEEN ORIGINAL PARTIES.—The doctrine of estoppel *in pais* is only applied to a bill of lading in the hands of a third party.

4. The fact that the shippers gave an order to the warehousemen for the cargo, and then settled with them on the faith of the bill of lading, does not take the case out of the general rule.

The libel alleges that on the 14th of October, 1854, the schooner J. W. Brown received on board at Chicago, to be carried to Buffalo, 10,097 bushels of wheat, and that the captain of the schooner contracted to deliver the same to the libellants, or order, in Buffalo, and gave a bill of lading to that effect; that the libellants accounted with J. S. Root, from whose warehouse it was delivered, for that quantity, and that the captain knew the libellants would account with Root for the number of bushels mentioned in the bill of lading, and that owing to carelessness, negligence, and improper conduct, 715 bushels were never delivered at Buffalo.

The answer admits that the bill of lading was given for the quantity mentioned in the libel, but insists that, owing to mistake or inadvertence, it should have been for 9,382 bushels, instead of 10,097; that the former quantity was all, in fact, that was received on board, and that none was lost in the transit from Chicago to Buffalo, but whatever was received was delivered. J. S. Root & Co. had a warehouse for storing wheat. Richmond & Co. had purchased of different persons Root & Co.'s warehouse receipts to the amount of 9,462 bushels at the time the vessel was loaded. The balance was made good, on the 17th of October, to Root & Co. Richmond & Co. kept a wheat account with the warehousemen. Whenever any warehouse receipts were purchased or any wheat stored, it was charged to Root & Co., and whenever a shipment was made it was credited to them. The libellants gave an order on the warehousemen for this cargo of wheat, and it was loaded accordingly. After it was loaded, the captain gave a receipt to J. S. Root for 10,097 bushels of wheat received on board of the schooner, on account of the libellants, and signed the bill of lading for that number. The captain brought the statement of the quantity to Richmond & Co., and Root & Co. were credited with that quantity, and a settlement was subsequently made upon that basis. When the

cargo was delivered at Buffalo it was found to be short 715 bushels.

H. F. Waite, for libellant.

H. G. Miller, for claimants.

DRUMMOND, J. The first point is as to the deficiency. How did it occur; by carelessness and neglect of the carrier in the transit, or was it in fact never delivered on board? There is something singular and inexplicable about it. It seems that there were two tallies kept, and that both agreed; and yet it is difficult to resist the conclusion that there was a mistake in some way, by which there was an over tally.

When the captain of the schooner brought the statement of the quantity of wheat from the warehouse to the clerk of the libellants, he stated that he did not believe that he had so much wheat on board: that his vessel had never carried so much, and could not, but as the tallies of his men and the warehouse men agreed, and he could find no errors in the figures, he would sign the bill of lading.

The evidence is that the wheat was weighed in hoppers, of draughts of fifty bushels each: part of it, however, was taken from a canal boat, and it is probable that some of it was twice weighed. It appears that nothing occurred on the voyage by which any portion of the wheat could have been lost. The hatches were battened down as soon as the cargo was stowed, and were not removed till the arrival of the schooner in Buffalo, and then the wheat was found uninjured and undisturbed. No accident of any kind occurred during the voyage. The captain immediately after the discharge of the vessel made an affidavit of the deficiency, stating that all was delivered at Buffalo that was received at Chicago, and that it must have arisen, in consequence of a mistake at Chicago, on the part of the tallymen, which affidavit, it appears, was forwarded to the libellants. It would seem, therefore, as though there could be no doubt that the bill of lading was given for too large a quantity. It follows that the statement in the libel

that the vessel received on board, 10,097 bushels is not true to its full extent, but as it is satisfactorily established that all was delivered at Buffalo that was received at Chicago, there were in point of fact, only about 9,382 bushels.

The next point to be determined is, whether there is anything in the case which operates as an estoppel against the owners of the schooner, and prevents them from showing as matter of evidence, that in fact they did not receive the quantity on board set forth in the bill of lading; because it is only upon this ground—that of equitable estoppel—that the claim of the libellants can be sustained.

This rule applies, when the bill of lading has been assigned to a third person, by the shipper. It is upon this principle, the case of *Howard vs. Tucker*, 20 English Common Law, 661, was decided. The captain had signed a bill of lading, acknowledging the freight had been paid, which was contrary to the fact; and the court held the owners of the vessel were estopped by that acknowledgement, as against an assignee, to whom it had been endorsed for value. I think it will be found that this doctrine of estoppel, *in pais*, has only been applied to the bill of lading when it has been transferred to a third party.

The better opinion seems to be as between the original parties—shipper and owner of the vessel—that the bill of lading is in the nature of a receipt, as to the quantity put on board, and is open, like any receipt, to explanation as to the real quantity.[1] The libellants in this case were the shippers, and they bring the action against the vessel, and the question to be determined is, whether the fact that they gave an order to the warehousemen to deliver a cargo of wheat, and then settled with them upon the faith of the captain's receipt and bill of lading, takes this case out of the common rule.

The libellants had a certain quantity of wheat—at the time not all that was delivered—at the warehouse of J. S. Root. The captain was directed to load his vessel there, and the

[1] Flanders on shipping, Sec. 479 and notes; Abbott on Shipping, part 4, ch. 4, pp. 323 to 345; Bates *vs.* Todd, 1 Moody and Robinson, 106; Berkley *vs.* Watling, 34 English Common Law Rep., 22-3.

warehousemen were ordered to fill the vessel. It does not appear whether the order was written or verbal. No written order has been produced, and the presumption is, it was oral. A mistake, intentional or unintentional, having been made, the question is, to whom, under the circumstances, are J. S. Root & Co. accountable for the deficiency.

It may be conceded that the fault or error, as between the warehousemen and the vessel was common, still it was not *wholly* the fault of the captain, and possibly, as the warehousemen only had the machinery for weighing, &c., they, in case of error, should be held as being most in fault. It is to be recollected that this is not the case of the transfer of a warehouse receipt, taken in good faith for what it bears on its face, but of the delivery of a cargo by warehousemen, who, in this respect, were acting under the direction of the libellants. To say the least, they were quite as much their agents as they were agents of the vessel, and there is, besides, a direct privity of contract and of interest between the libellants and the warehousemen, which would, if this were for money, make the latter liable to the former, upon well settled principles, in an action for money had and received to their use, as for so much money paid by mistake. It must be admitted that the case is not entirely free from difficulty, but it seems to me the rule here sanctioned is the safer and sounder one, all things considered.

The libel must therefore be dismissed with costs.

A carrier may show by clear proof that the bill of lading was signed, by mistake, for a greater quantity than was shipped. Goodrich *vs.* Morris, 1 Abbott's Admiralty Reports, 196.

For a full collection of the authorities on this point, see Parsons on Shipping and Admiralty, Vol. 1, p. 190, note 4.

The master of a vessel is not liable for more cargo than was actually received, notwithstanding he has, by mistake, signed a bill of lading for a greater amount. The Tuskar, 1 Sprague, 71.

A variance between the amount of cargo stated in the bill of lading, and that ascertained on delivery, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence. Manchester *vs.* Milne, 1 Abbott's Admiralty Reports, 115; Manning *vs.* Hoover, Ibid., 188.

Consult also 3 Kent, 208, and numerous authorities there cited.—[*Reporter.*

TOUCEY vs. BOWEN.

CIRCUIT COURT—DISTRICT OF INDIANA—NOVEMBER TERM, 1855.

SUITS REMOVED FROM STATE COURT.

1. MUST CONFORM TO RULES OF UNITED STATES COURTS.—Suits removed from the state courts into the courts of the United States are governed by the rules of the latter courts and must be made to conform substantially to the modes of procedure observed therein as in original cases.

2. But where the state has adopted a code, the plaintiff will not be held to any technical observance of the mere form of action.

3. INDIANA BANKING ACT—WHEN STOCKHOLDERS MAY BE SUED.—Under the act of the legislature of Indiana, of May 28, 1852, "to authorize and regulate the business of general banking," and the act of March, 1855, amendatory thereto, no suit can be maintained against a stockholder in any such bank in his individual character for the payment of any portion of the regular notes issued by such bank and protested for non-payment, until it is shown that the stocks deposited with the auditor of state, to secure the redemption of the circulation are first exhausted, or that the bank is insolvent.

This is a suit instituted by Toucey to recover the amount of certain bank notes issued by the Wabash Valley Bank and protested for non-payment at the place where the bank was located. The defendant is charged as the sole stockholder in the bank, and the declaration alleges that no such bank or banking house is in existence at the place,—Jasper, Dubois County, Indiana,—where the notes purport to be issued and are made payable. The plaintiff, after the necessary allegations to show that Bowen established the institution and put the notes in circulation by virtue of the general banking law of the state, proceeds to charge him, in his individual capacity, for the amount of the notes and damages fixed by the law under which the institution was established.

To this declaration the defendant filed a general demurrer.

Dumont & Torbet, for plaintiff.

David McDonald, for defendant.

HUNTINGTON, J.—This proceeding having been instituted in the state court, partakes both of a legal and equitable character—the new code of procedure having abolished the distinction between equitable and legal proceedings. In this court this distinction is maintained, and all our proceedings are governed by the principles of the common law, except in cases where we have for convenience adopted a different practice. By an act of Congress, a non-resident sued in the courts of the state, may remove his cause to this court, and when it comes here the proceedings must thenceforth be governed by our own forms and rules of procedure. If the suit is in the nature of an action at law, it will take that distinct form here, and, if a purely equitable proceeding, will be governed by the rules of the court of chancery. Some inconvenience will no doubt grow out of this, so far as the mere forms of procedure are concerned, and in some cases it may be necessary to so amend the proceedings as to make them conform to our rules, or in other words, so as to give a distinct legal or equitable character to the proceedings.

The legislature, in abolishing the ancient forms of action, and the distinctions hitherto observed between proceedings in law and in equity, have not touched the old and long sanctioned principles which govern the rights of parties prior to this innovation. It has simply dispensed with certain forms, and the proceedings before the state tribunals are made to conform by operation of law to the nature of the case presented, whether it be legal or equitable.

The case before us is in the nature of an action at law, in form *ex contractu*, and should the declaration on examination lack any substantial requsite, which, according to the principles governing proceedings in this court, will allow the plaintiff to maintain his action here, the party will be compelled to amend it. In short he must show a cause of action, and in some sort make his proceedings conform to the rules which govern this court, though the court will not hold him to a technical observance of forms, so far as the mere title of the action is concerned.

This case then being within our jurisdiction, I proceed to consider it, as if it had been originally commenced here.

There are various objections raised by the counsel who appears in support of the demurrer, some of which it may not be necessary to notice, indeed, if I am right in the view taken of one, and, as I esteem it the important question, it settles the case against the right of the plaintiff to maintain his suit at all, until it is shown that the securities deposited with the Auditor of State,—namely the stocks,—have been fully exhausted.

It is necessary, in order to a proper understanding of this question, to re-examine somewhat in detail the provisions of the general banking law.

The "act to authorize and regulate the business of general banking," was approved May 28, 1852. The first section makes it the duty of the Auditor of State, on application of "any person or association of persons," wishing to organize under the act, to cause to be engraved and printed, such quality of notes, in the similitude of bank notes, in blank, of different denominations as may from time to time be needed to meet the demands of these organizations for the purpose of banking.

The 5th section provides that any person, or association of persons, formed for the purpose of banking, on transferring to the Auditor a certain amount of a certain description of stocks, shall receive from the Auditor an equal amount of these notes, &c. The 6th section designates the kind of stocks and securities allowed to be deposited with the Auditor. The 8th section is as follows: "In case the maker or makers of any such circulating notes, countersigned and registered as aforesaid, shall at any time hereafter, on lawful demand at the place of business specified in such note, fail or refuse to redeem such note in the lawful money of the United States, the holder of such note, making such lawful demand, may cause the same to be protested for non-payment by a notary public, in the usual manner; and the Auditor on receiving and filing in his office such protest, shall forthwith give written notice to the

maker or makers of such note, to pay the same, and if he or they shall omit to do so for thirty days after such notice, the Auditor shall immediately (unless he shall be satisfied that there is a good and legal defense against the payment of such note or notes) give notice in one of the newspapers published in Indianapolis, that all the circulating notes issued by such person or association, will be redeemed out of the stocks held by him in trust for that purpose; and it shall be lawful for the Auditor to apply the said trust funds belonging to the maker or makers of such protested notes, to the payment and redemption of such protested notes, with costs of protests, and to adopt such measures for the payment of all such circulating notes, put in circulation by the maker or makers of such protested notes, pursuant to the provisions of this act, as will, in his opinion, most effectually prevent loss to the holders thereof."

On the 3d of March, 1855, the legislature passed an amendatory act, but without materially changing this provision. Before, then, a person or association of persons could procure the notes for banking, they were obliged to deposite an equal amount of stocks with the State Auditor, to secure their redemption. These stocks are designated in the act as *trust* funds, and where any notes were protested, (as in the case before us) for non-payment, and filed with the Auditor, the Auditor is authorized and directed without delay, to redeem such notes out of these stocks, after thirty days notice to the bank. Can anything be more clear than that these funds were intended to be first applied to the redemption of this circulation, and first of that which had been protested for non-payment?

Section 9 of the act, speaks of these stocks as security for the payment of these notes, and the 18th section provides that the notes on their face shall be stamped, "secured by the pledge of public stocks." The 13th section provides that these public stocks shall be held by the Auditor "exclusively for the redemption of the bills or notes" put in circulation.

But it is said that by the 25th section "every shareholder

shall be liable in his individual capacity for any contract, or debt or engagement of such association, to an amount over and above his stock, equal to the amount of his shares of said stock." This is the provision on which the plaintiff rests his right of action, and it is contended that notwithstanding these stocks are still deposited with the auditor and subject to be applied to the redemption of these notes, (for there is no allegation to the contrary, nor any showing the insolvency of the bank) the plaintiff has the right to his election—either to seek payment by means of the stocks, or have his remedy by action at once against the defendant, who is, it seems, the sole stockholder of this bank. But let us examine it a little minutely. Every stockholder shall be liable individually for "any contract debt or engagement" to an amount over and above his stock, equal to the amount of his shares of such stock. Not one word is said in this section about notes protested for non-payment, though in a certain event they would undoubtedly fall within the meaning of the phrase, "any contract, debt or engagement." The stocks were set apart solely for the security and redemption of the circulation, and could not be used for any other purpose. The individual liability was intended to cover all the engagements of whatsoever nature, which the bank should enter into, to an amount over and above the fund set apart as a trust, to be applied to the prompt redemption of their circulation. And it seems to me clear that such liability was to attach only when the funds of the corporation were exhausted. For by referring to the preceding (24th) section, it will be seen that all persons having demands against one of these banks, should first bring his action "against the President thereof"—in short, against the bank. "And all judgments and decrees obtained or rendered against such President, for any debt or liability of such association, shall be first enforced against the joint property of such association," which property is made subject to rule on execution.

The plaintiff perhaps gives a sufficient reason for not suing the bank, as, according to the declaration, it has no place of business, no existence in fact, and if he had gone farther and

shown that there were no stocks in the hands of the Auditor for the redemption of these protested notes, I think it would be clear that the suit could be maintained against the defendant as a stockholder, for there are no other outstanding liabilities, equal to and over and above his stock.

If the doctrine contended for, by the plaintiff's counsel, can be maintained, there would be no security against innumerable and vexatious suits against individual stockholders, and as many suits might be brought as a man had bills in his pocket, if an unworthy feeling prompted him to protest them at different times for non-payment. Certainly the legislature never intended to open such a door for litigation and oppression; but by requiring a trust fund to be deposited with a state officer, liable at any time to be applied to the redemption of these notes, without suit and without delay, they require that fund to be first exhausted before this individual liability attaches. It is said, however, that the Constitution governs the rights of these parties independent of the act. I do not think so. The 25th section of the act is but a transcript of the 6th section of the 11th article of the Constitution, and I think warrants no other construction than that just given.

There are several other objections urged against the declaration, but it is not necessary to notice them. This is however a question of some magnitude and great interest, and if it is desired that this opinion be reviewed by the Supreme Court of the United States,—and I should be gratified if it could be,—the plaintiff can amend, if he thinks proper, his declaration in any particular he desires, so that it may be free from every objection except that just decided, and which goes to the very foundation of the action itself.

This is a question that does not depend on authority, for I have been unable to find in the books, a case which even resembles it; neither the case in 10 Ohio, or in 8 Cowen, bear upon this question. In the former, the point decided, was that a suspension of specie payment might be carried so far as to work a forfeiture of chartered privileges.

The case of *Briggs vs. Penniman*, 8 Cowen, 387, cited by

the plaintiff's counsel, was a proceeding in chancery by one of the stockholders of an insolvent corporation. The important question in that case was, whether a stockholder in the corporation, liable by virtue of the statute creating the corporation, in his individual character, for an amount equal to the amount of his stock, could be sued by a creditor of the corporation, before its franchises had been taken away by due course of law. It was decided, that the corporation, ceasing to do business as such, and being without funds, was in contemplation of law, dissolved, and therefore the liabilities of the stockholders individually attached.

Demurrer sustained.

PITTS vs. WEMPLE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER TERM, 1855.

1. The claims of a patent are to be construed with reference to the state of the art at the time of the invention.

2. The whole patent, including the specifications and drawings, is to be taken into consideration, but we look only at them for the purpose of placing a proper construction on the claim.

3. The invention set forth in the first claim of Pitts' patent consists in the peculiar construction of the apron and of its use in the machine, and operating substantially as described. It does not consist of an endless apron merely, or of an endless apron divided into troughs or cells merely, but of the apron as it is described operating in the machine substantially as described, that is, such an apron in such a machine.

4. It is not necessary that a prior machine should have been actually used for the purpose contemplated, but it must have been capable of such use, and a mechanic of competent skill should be able in the then state of the art to construct the machine, so as to produce the result, from an inspection of the specification and drawings.

5. A man may obtain a patent for an invention and let it lie in the Patent Office without use, and no one else would have the right to use such invention because it is his property.

6. Still in ascertaining whether the machine is capable of use, it may be important to know that the inventor had never made or used the machine, because the presumption is, that a person obtains a patent for something practical, and not for a mere experiment.

7. The question is not whether the apron of the defendant's machine operates as perfectly as the apron of the plaintiff's machine, but whether it is the same in principle or not.

8. By the principle of a machine or improvement, is to be understood, the peculiar mode, manner or device by which the proposed result or effect is produced.

9. The superior utility of the defendant's elevator, is not of itself a certain test upon the question of identity, because the defendant's machine might contain the whole substance of the plaintiff's and something in addition, and the addition would not prevent it from being an infringement.

This was an action on the case tried by Judge Drummond and a jury, for the infringement of a patent issued to Hiram A. and John A. Pitts, December 29, 1837, and assigned to plaintiff for "a new and useful improvement in machines for threshing and cleaning grain."

The specification of Pitts set forth that the inventors "had invented a new and improved combination of machinery for separating grain from the straw and chaff as it proceeds from the threshing machine."

The chief feature in their invention consisted in an endless belt or apron, proceeding from the threshing machine to the fan-mill, which was of a peculiar construction. The apron was provided with a series of narrow wooden compartments, of a sufficient height above the apron to permit the grain, which was separated from the straw and chaff by the agitation of the machine when in operation, to fall through into the cells. By this means the straw and chaff were carried along on the tops of the boxes, and kept from being commingled with the grain below, until, by the action of the machine, the compartments were carried forward and emptied the separated grain into the fan-mill, and the straw and chaff passed off over the end of the apron.

Previous to the invention of the plaintiff, an endless apron with cells or buckets, had been used as a carrier, or elevator, to carry flour and other materials from one point to another.

The defendant put in evidence a patent issued to Samuel Lane, April 6, 1831. The Lane patent contained an endless apron proceeding from the threshing machine to an endless sieve.

The Lane apron had no compartments or cells, but was a smooth apron, and was used in his machine to carry forward the threshed grain as it came from the thresher, mixed with the straw and chaff to an endless sieve, by the agitation of which sieve the grain was separated from the straw and chaff, which latter were cast off over the end of the sieve, while the sifted grain was conducted from the sieve to the fan-mill.

In the defendant's machine there was also an endless apron, which carried the threshed grain to a peculiarly constructed sieve, secured to Wemple by letters patent, granted July 13, 1844, and the sifted grain was conducted from the sieve to the fan-mill. It further appeared that the defendant had sometimes used slats about half an inch in thickness, nailed to the apron, and placed about a foot apart, to give it stiffness and prevent it from sagging at the sides.

In addition to these features of the machine, there was what was termed a side elevator in the Pitts machine, which constituted the fourth claim of the patent. This consisted of a larger sieve extending beyond the upper sieve, into which the light grain or tailings which pass over the sieve was received, and from which lower sieve it was conducted through a shoe underneath and a spout to an elevator by which it was taken up and emptied into the upper sieve of the machine, for further sifting. In the Wemple machine there were also a lower projecting sieve and shoe and spout, through which the grain received by them was poured into a side elevator, and was carried forward and emptied into the thresher of the machine.

The claims of the plaintiff's patent are set forth in the charge of the court.

Chickering & James, for plaintiff.

E. C. Larned & Grant Goodrich, for defendant.

DRUMMOND, J. charged the jury as follows:

This is an action brought by the plaintiff to recover damages from the defendant for the infringement of letters patent granted by the United States to John A. Pitts and the plaintiff, and of which the latter is assignee for Illinois.

In the present trial, the discussion has been brought within a very narrow compass: that is, first, the extent and nature of the claims contained in a patent of the plaintiff; and, second, the infringement of those claims by the defendant, both of which are resolved into the last point, that is, whether the defendant has been guilty of a violation of the plaintiff's patent.

The validity of the plaintiff's patent has not been questioned at the present trial. It is admitted that as properly limited and interpreted, it is valid. Testimony has been introduced to prove the state of the art at the time, and this is always necessary, because the claims in the patent are to be construed with reference to the state of the art at the time of the invention. It is with this view that the Lane patent has been introduced, and has been allowed to go before you.

The court is of opinion now, as it always has been, that the Lane patent, even if it covered a practical improvement in the machine for threshing and cleaning grain, may be permitted to stand, without impairing the just claims of the plaintiff, for reasons that will be briefly stated hereafter.

The patent law requires the inventor to set forth the nature and extent of his discovery, so that, by referring to his letters patent, a mechanic of competent skill may be able, in the state of the art as then understood, to construct the machine or improvement, if the invention relate to a machine. And he must particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery. He is restricted to this claim. It is true that the whole patent, including specifications and drawings, is to be taken into consideration, but we look at them only for the purpose of placing a proper construction upon the claim.

Guided by these principles, let us look into the plaintiff's patent.

The patentees set out with declaring that they have invented a new and improved combination for separating grain from the straw and chaff as it proceeds from the threshing machine. This they declare to be their invention. They then minutely and particularly describe this new and improved combination of machinery for accomplishing that result. After this description, they comply with the demands of the law, by setting forth their claims, which have been classified as follows:

They claim,

First, The construction and use of an endless apron, divided into troughs or cells in a machine for cleaning grain, operating substantially in the way described.

Second, The revolving rake, for shaking out the straw, and the roller for throwing it off the machine, in combination with such a revolving apron as set forth.

Third, The guard slats in combination with a belt (apron) constructed substantially as above described.

Fourth, The combination of an additional sieve and shoe with the elevator for carrying up the light grain, in the manner and for the purpose set forth.

If we take these four claims and apply them to the description of each, as contained in the specifications, drawings, &c., we shall clearly understand the nature and effect of each distinct claim.

The only thing that is claimed as new, is the construction and use of the apron, and that is claimed in the machine as described.

All the other claims consist of combinations of parts with each other.

As to the first claim, I agree with all the courts that have had this patent before them. It consists in the peculiar construction of the apron, and its use in the machine, and operating substantially as described.

It does not consist of an endless apron merely, nor of an endless apron divided into troughs or cells merely, but of the apron as it is described, operating in the machine substantially as described, that is, such an apron in such a machine.

And here may be shortly stated the reason why the patent of the plaintiff may be sustained, notwithstanding the Lane patent may be considered valid; and it is because of the construction which is given to this first claim of the plaintiff. Lane only used an endless apron for the purpose of carrying the grain and straw to a sieve or rake, which connected with a fan-wheel. Lane's apron was a smooth apron, used only for the purpose of carrying forward the grain and straw. It was not constructed for, nor did it operate *as a separator* of the grain from the straw as it proceeds from the threshing machine. If the plaintiff's apron was constructed for that purpose only, and operated only to produce such a result,—on the supposition that the Lane patent is valid,—his patent would be void. But it is because the apron, with its appliances and combinations, the moment the grain and straw and chaff proceed from the threshing machine, produces the process of separation, and thus has a different office or function from that of Lane's apron, that the plaintiff's first, second, and third claims can be considered valid.

If the apron of the plaintiff's machine is not constructed for that purpose, and does not produce that result,—that of separation,—then these first three claims can not be sustained consistently with the validity of Lane's patent.

But it is said that Lane's patent can have no influence in this case, because his machine was not a practicable machine.

This may be true, and still it can not be disputed but that Lane invented the combination of an endless apron with a threshing machine, and a winnower for the purpose of carrying the straw and grain from the one to the other, and any one would have the right to use such an apron as that of Lane's for a similar purpose, and by other machinery or improvements (not including that of the plaintiff's) he might have a practical machine, and by so doing, he would not infringe as to the plaintiff's apron. This is so, because the machine of Lane might not have been practicable, from some other defect on the machine which had nothing to do with the office of the apron as a conveyer or carrier.

Whether Lane's machine was a practicable machine, is a question of fact for the jury. It is not necessary that it should have been actually used for the purpose contemplated, but it must have been capable of such use, and a mechanic of competent skill should be able, in the then state of the art, to construct the machine so as to produce the result from a mere inspection and examination of the specifications, drawings, &c.; that is, from the letters patent.

A man may obtain a patent for an invention, and let it lie in the Patent Office without use, and no one else would have the right to use such invention because it is his property; but, while this is true, as a matter of law, still in ascertaining whether the machine is capable of use, it may be important to know that the inventor had never made or used the machine, because the presumption is, that a person obtains a patent for something practical, and not for a mere experiment.

It need not be a very useful or profitable machine, but it must be capable of some use not mischievous, injurious, or immoral.

If the defendant has used any one of the four claims contained in the plaintiff's patent, then he is guilty of an infringement, and whether he has or not is a question of fact for the jury to determine; but in order to constitute an infringement there must have been the use of the whole of one or more of the claims—that is, the *whole* combination of one of the claims. This part of the controversy has been brought within somewhat narrow limits under the law, which it is the duty of the court to declare to you.

As to the first three claims of the plaintiff, there can be no infringement of either of these claims, unless the defendant has used the apron of the plaintiff's machine. The reason of that rule is this: his first claim is for the apron as used and operated and constructed. Of course to infringe that claim the plaintiff's apron must be used by the defendant.

The second claim is not for the revolving rake alone, nor for the roller alone, but for them in combination with such a revolving apron as set forth. The revolving apron as described

is of the essence of this claim, and there can be no infringement of this claim unless the defendant has used the plaintiff's revolving apron.

The third claim is not for the guard slats alone, but for the guard slats in combination with the apron constructed substantially as described. The apron is an essential part of this claim, and there can be no infringement unless the apron of the plaintiff has been used by the defendant.

The defendant's counsel have chosen to rest the defense, as to this part of the case, upon the point, as they allege, that the defendant has not used the apron as described in the plaintiff's patent.

If he has used the plaintiff's apron as described and claimed, it is conceded the defendant has infringed. Whether the defendant has used the apron of the plaintiff's machine, as described, is a question of fact for the jury to determine. The thing for you to decide is whether the endless apron, as used by the defendant in his machine, is constructed substantially like that of the plaintiff's machine, and operates substantially in the same way to produce the same result. It is not whether the apron of the defendant's machine operates *as perfectly* as the apron of the plaintiff's machine, but whether it is the same in principle or not. And by the *principle* of a machine, or improvement of a machine, as used by us here, is to be understood the peculiar mode, manner, or device by which the proposed result or effect is produced.

With this rule in view, as a guide to them, the jury will consider the evidence, and form their conclusions as to whether the apron of the defendant's machine acts upon the same principle as that of the apron of the plaintiff's machine. If it does, then the defendant is guilty as to this part of the case, otherwise not. The point is, whether the defendant has in the use of his apron, availed himself of the plaintiff's invention, as contained in his patent. If he has, no change of form merely will prevent it from being an infringement; but if there is a change in substance and principle, then there is no infringement.

Much has been said on both sides as to the slats which are found in the defendant's apron. It is for you to determine whether, by being placed there, it causes the apron of the defendant's machine to operate in substantially the same way, and to produce substantially the same result as that of the plaintiff.

The main point as to this is, whether it is a mere colorable alteration of the plaintiff's apron in this respect.

The fact that some separation takes place in the defendant's apron, of the grain from the straw, as it moves with the apron, will not constitute of itself an infringement of the plaintiff's patent in this particular.

Such separation may be a mere incident of the motion of the machine. It is probable, judging from the testimony, that an incidental separation takes place on Lane's apron as it carries the grain and straw from the threshing machine to the sieve, as described in his patent, and yet as already stated, admitting Lane's patent to be valid, the claim of the plaintiff's patent for the apron is not invalidated.

The main point, I repeat, is, do the aprons of the plaintiff's and defendant's machines operate substantially and in principle alike?

The foregoing remarks have been chiefly confined to the first three claims in the plaintiff's patent, because they all depend upon the use of the plaintiff's apron by the defendant.

We will now proceed to the last claim in the plaintiff's patent.

As already intimated, the defendant may not have violated any one of the first three claims, and yet he will be guilty of an infringement, if he has used the combination as described in the fourth claim.

It remains, therefore, for you to consider whether the defendant has used this combination of the plaintiff.

And upon this part of the case, the counsel for the defendant have rested the defense upon the point, as they allege, that the defendant has not used the side elevator of the plaintiff's machine as described in his patent. The facts on this

point are not disputed; and it is for you to determine whether the change that is made in the elevator used by the defendant changes the principle upon which it operates. The plaintiff states, in the patent, the manner in which his elevator operates. He places one sieve beyond another into which the light grain, that may have passed over, may be received, passing through into a shoe underneath and out at a spout on an elevator which carries the light grain into the sieves again for a more effectual cleaning.

It will thus be seen that the elevator of the plaintiff's machine takes the "tailings," as they have been called by most of the witnesses, and raises them upon a band of elevators, to be thrown upon a sieve to be re-cleaned.

This is the description and result of his combination. And you will understand that the same rule applies here as in the other claim, that is, the whole combination of this claim must be violated, and that the elevator is a material part of this claim, and we only consider the question of the elevator because the defendant's counsel rest their defense, in this respect, on the elevator. And it is true, in point of law, if the defendant does not use the elevator of the plaintiff's machine, as described in his patent, he does not infringe this claim.

The elevator, which has been used by the defendant, takes the tailings and raises them upon a band of elevators, to be thrown upon the thresher for a more effectual threshing as well as cleaning, and the question of fact, to be determined by you, is whether the defendant's method is substantially the same as that of the plaintiff's

The superior utility of the defendant's elevator is not, of itself, a certain test upon this question, because the defendant's might contain the whole substance of the plaintiff's and something in addition, and the addition would not prevent it from being an infringement.

For example, if the defendant's elevator took the tailings and carried them on the sieve, and *after that* did something in addition which rendered it more useful than that of the

plaintiff, that circumstance would not prevent it from being an infringement of the plaintiff's claim.

A truer test, it seems to me, is whether the elevator of the defendant, and its mode of operation, would constitute it, with reference to the elevator of the plaintiff, a substantial invention, sufficient to support a patent as for a new thing.

After a patent has been obtained for a particular thing by one person, another person, without appropriating that patent, may invent a new mode of accomplishing the same or a similar object, and the latter will be entitled to a patent for his discovery. He must, however, invent something material and new—that is essential to the subject matter of the invention. If what he has done is only to vary the invention of another in certain particulars, without affecting the principle, then the subject matter remains the same. But if he has introduced a new element or principle into the subject matter of the invention, then there is no infringement.

You will apply these rules to the question involved in this part of the case. You will recollect the testimony as to the tailings. It was stated by all the witnesses that there would be unthreshed heads of wheat or grain under certain circumstances. And it was said to be the practice, when the short elevator was used, to gather them in a basket and throw them into the thresher.

The point is, whether this adds a new principle to the elevator, not contained in the combination of the plaintiff, notwithstanding the tailings, as thus thrown into the thresher, may eventually reach the sieve where they are thrown by the combination of the plaintiff.

The queston is, whether this is or not a mere incident to the operation of the defendant's elevator, or whether or not the latter is substantially the same thing, under a mere change of form.

If it is in fact substantially different, and acts upon a different principle, then the plaintiff's patent, would not prevent another patent for the long elevator from being valid, but both might stand, otherwise not.

It will thus be seen by the jury that, as the case is presented to them, there are two main questions of fact to be found by them.

First. Did the defendant in his machine, use the apron of the plaintiff as described in his patent?

Second. Did the defendant in his machine, use the side elevator of the plaintiff's machine as described in his patent?

If the jury should find both or either of these questions in the affirmative, then the defendant is guilty, and they will so render their verdict.

If the jury should find both of these questions in the negative, then the defendant is not guilty and they will so render their verdict.

If the jury should find in the affirmative on one or both of these questions, they will please to state whether they find on one or both.

The jury found for the defendant.

The opinion of McLean J., on previous trial of this case is reported in 6 McLean, 558.—[*Reporter.*

CLARKE vs. CITY OF JANESVILLE.

DISTRICT COURT.[1]—DISTRICT OF WISCONSIN.—MAY TERM, 1856.

RAILROAD BONDS AND COUPONS.

1. A bond under seal given by a city to a Railroad Company located in the same state cannot be sued in the federal courts, even by an assignee.

2. Interest coupons annexed to such a bond, and referring to it have no independent vitality, and, even though made payable to bearer, come under the same rule.

3. Such coupons are not negotiable paper. They are merely evidences of interest, and it is upon the bonds alone that the interest is recoverable, and action of assumpsit will not lie.

[1] In Wisconsin, the United States District Court had, until the regular organization of the Circuit Court, in 1862, Circuit Court Jurisdiction.—[*Reporter.*

Declaration in assumpsit upon the common counts; to which the general issue was pleaded. In support of the issue on the part of the plaintiff were offered, in evidence several bonds of the City of Janesville, to the Rock River Valley Union Railroad Company, with coupons or interest warrants annexed. The bonds were issued in the year 1853, for one thousand dollars each, payable in twenty years, with interest at the rate of eight per cent. per annum, payable semi-annually, at the city of New York, signed by the mayor of the city, with the seal of the city annexed, and countersigned by the treasurer of the city. They are payable to the said railroad company or assigns, and on the day of their date they purport to have been assigned by the President of said company to——, or bearer. Printed on the same sheet of paper, with each bond, are forty coupons, or interest warrants, each for forty dollars, for semi-annual interest, according to the condition of the bond. These coupons are signed by the treasurer of the city, and are made payable to the bearer, in regular succession of every six months, for twenty years. This suit is to recover the interest that had accrued on these bonds since their date.

To this evidence the defendant's counsel objected for several reasons, of which the following are here noticed.

1. These coupons or interest warrants have no legal validity independent of the bonds to which they are annexed, and they pass to the assignee of said bonds.

2. There is no law in this state empowering an assignee of a bond or specialty to maintain a suit in his own name.

3. This court has no jurisdiction of this cause, the jurisdiction being excluded by section 11 of the Judiciary Act of 1789, 1 Statutes at Large, 78.

These bonds were issued in pursuance of an act of the legislature of Wisconsin, entitled "An Act to incorporate the City of Janesville," approved March 19, 1853.[1] By section 7 of said Act, "the common council shall have power to submit to the legal voters the question, whether said city shall take stock in any railroad running to, or passing through said city. And if

[1] Private and Local Laws of 1853, chap. 93.

a majority of the votes cast on any such question be in favor of taking stock, then the common council shall, by resolution to be entered on the city records, authorize the mayor to subscribe for the city the amount of stock voted to be taken." And by section 9, "the common council shall have power to issue the bonds of the city, with coupons or interest warrants attached, drawing not more than ten per cent. interest, to pay the stock so subscribed, and shall have power to levy a special tax on the taxable property in said city, to pay the interest on such bonds, and also the principal, when the same becomes due. But the common council shall not have power to dispose of such bonds for less than the face thereof."

The Rock River Valley Union Railroad Company and the City of Janesville are corporations created by the laws of Wisconsin; and they are located and doing business in said state.

Browne & Ogden, for plaintiff.

Noggel & Rexford, for defendant.

MILLER, J. The clause of the eleventh section of the Judiciary Act, in regard to the jurisdiction of the federal courts, is this: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or chose in action in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." This section is restrictive of jurisdiction contemplated by the third article of the Constitution of the United States, which provides that the judicial power shall extend to controversies between citizens of different states. The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit or district courts. These courts were created by statute, in pursuance of the Constitution, and can have no jurisdiction but such as the statute confers.[1] It is well understood, by those experienced in the jurisprudence of

[1] Sheldon *vs.* Sill, 8 Howard, 441.

the United States, that Congress has conferred upon the federal courts but a portion of the jurisdiction contemplated by the Constitution. This prohibition was inserted in the law for the purpose of relieving the federal courts, as much as possible, of enforcing local contracts; and also of preventing assignments of choses in action to non-residents, for the purpose of rendering a defense upon the merits or a set-off less available to defendants.

A suit might be sustained in this court, by the plaintiff against the defendant, to recover possession of these bonds in specie, or damages for their wrongful caption or detention; for this law has no application to such a suit by the assignee of a chose in action, but only to a suit or action to recover the contents.[1] So in *Smith vs. Kernochen*, 7 Howard 198, an assignee of a mortgage between parties of the same state, maintained ejectment against the mortgagor to recover possession of the mortgaged premises.

In *Sheldon vs. Sill*, 8 Howard 441, it is decided, that a bond for a debt with a mortgage to secure it, is a chose in action; and that the assignee of a mortgage between citizens of the same state, cannot maintain a bill in chancery to foreclose, when the mortgagee cannot, because it is a suit to recover the contents of a chose in action. Nor have the federal courts cognizance of a suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such courts to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. This restrictive clause is literally construed.[2]

It is contended that these bonds were intended for negotiation as promissory notes, and that they were so put in circulation by the assignment. In pursuance of the act of incorporation of the City of Janesville, these bonds were given to the Railroad Company, in payment of stock in said company,

[1] Deshler *vs.* Dodge, 16 Howard, 622.

[2] Gibson *vs.* Chew, 16 Peters, 315; Dromgoole *vs.* The Farmers and Merchants' Bank, 2 Howard, 241.

subscribed for by the city. The law did not require the Railroad Company to accept these bonds in payment of the stock; nor did it authorize them to be given to any particular person or corporation, or to be put in circulation as negotiable paper. The bonds might either be given to any person or corporation who would furnish their amount at par, as a loan to the city, or to the Railroad Company in payment of the stock. The act prohibited the common council from disposing of them for less than their face; thereby placing the City of Janesville, as a stockholder by means of these bonds on an equality with the other stockholders who paid in cash. And whether the assignment of the bonds is equitable or legal, the effect thereof, as to the assignee, in regard to the jurisdiction of the court, is the same.[1] The assignment of these bonds is not to the plaintiff by name, but to ——, or bearer, leaving the space for their or any other names to be inserted. This may be proper in a financial point of view, to save the necessity of a formal assignment at each transfer. But these bonds are made to the Railroad Company or its assigns; and an assignment is necessary to pass them. The Railroad Company being a corporation created by the laws of this state, and located and doing business therein, cannot maintain a suit upon these bonds to recover their contents or the interest accrued on them, either in its own name or in that of an assignee.

When the plaintiff has a legal right to sue, the court will not inquire into the residence of those who may have an equitable interest in the demand, as in *Bonnafee vs. Williams*, 3 Howard, 574, where it is decided that the court has jurisdiction where a note is made by a citizen of one state, and payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state, although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived. But in its inception, a bond should be made payable to some certain obligee, and cannot be made payable like a

[1] Sere *vs.* Pitot, 6 Cranch, 332, opinion by Marshal, C. J.

note or bill to bearer.[1] And the legal right to recover on a bond is in the obligee.[2] These bonds are under the seal of the corporation of the city, and are specialties, and not negotiable as bills of exchange and promissory notes, either by the law merchant or by statute. All interest in them, either legal or equitable, must pass from the obligee by assignment or endorsement. By the assignment of these bonds, the plaintiff may have acquired an interest in them sufficient to control them, and to receive their contents, but he cannot sue in his own name. There is no statute authority in this state for the assignment or transfer of a bond or specialty, whereby the assignee or holder may become the legal owner, and be enabled to sue in his own name. The law authorizing the execution, and delivery of these bonds, and the consideration expressed show the railroad company to be the legal obligee, which can be the only plaintiff in a suit upon them, either for principal or interest, in the absence of a law enabling an assignee to become a legal party. In the case of *Irvine vs. Lowry*, 14 Peters, 293, the note in suit was made by Lowry, payable to Irvine or order, in the notes of the Lumbermen's Bank, and was endorsed to the bank. The Supreme Court in the opinion say, "The paper on which the suit is brought is not negotiable by the usage or custom of merchants. It is payable to order. The promise is pay so many dollars, but not to pay any certain sum of money. It is a promise to pay the amount 'in the office notes of the Lumberman's Bank at Warren,' which are not money, and, at most, a chattel. Not being a promissory note, either by the law merchant, or by the statute of Anne, or the kindred act of Assembly of Pennsylvania, it is not negotiable by indorsement; and not being under seal, it is not assignable by the Act of Assembly on that subject relating to bonds. The bank, therefore, cannot sue in their own name, by virtue of the endorsement of Irvine in blank; nor could they so sue if it was specialty endorsed to them, because the legal right of action would still remain in Irvine, though the equitable

[1] Marsh *vs.* Brooks, 11 Wendell, 409.

[2] Irish *vs.* Johnston, 1 Jones, Pa., 483.

interest in the thing promised may have passed to the bank."

So it is in this case, in the absence of a statute providing for an assignment of bonds, and for the assignee maintaining suit in his own name. The legal right of action remains in the Railroad Company, the obligee, though the equitable interest in the contents of the bonds may have passed to the plaintiff.

It may be said, that, although these obligations have been issued by a corporation having a seal, and which is thereto annexed, they should be considered as negotiable choses in action. But it is now well understood, that corporations can issue promises in writing to pay money, and can contract debts, without the use of their seal. The coupons call these papers certificates; but the law, authorizing the council to issue them, terms them bonds, and on their face they have the form of bonds. But let them be technically bonds or not, they can only be transferred by assignment.

This suit is in assumpsit upon these coupons, for the semi-annual interest payable before the date of the summons. The plaintiff has proceeded upon them as promissory notes or negotiable paper payable to bearer; and he contends that the law restrictive of our jurisdiction is not applicable to them. It is well settled, that this provision of law does not extend to notes payable to bearer; upon the ground, that the original promise is to pay any person, who may happen to be the bearer; and that as the interest in such a note passes by mere manual delivery, the holder cannot therefore be said to claim by virtue of an assignment, and is not affected by the disabilities of the nominal payee.[1] But is the original promise or obligation of the City of Janesville in these coupons? The charter of the city authorized the common council to issue bonds, with coupons or interest warrants annexed. In pursuance of that law, and a resolution of the common council, bonds were executed by the mayor, as the head and president of the council and corporation, under the corporate seal, for one thousand dollars each, payable in twenty years, with interest at

[1] Bullard *vs.* Bell, 1 Mason, 243; The Bank of Kentucky *vs.* Wister, 2 Peters, 318.

the rate of eight per cent. per annum, payable semi-annually at the city of New York, with forty coupons or interest warrants attached to each bond, representing the interest condition of the bond.

The bonds are signed by the mayor and countersigned by the treasurer of the city. The coupons or interest warrants are signed by the treasurer alone; and they do not purport to be obligations of the city through the common council, but have a direct reference to the bond, using the word certificate, to which it is attached. There is no question, that by the face of the bonds, in connection with the coupons, the interest is recoverable semi-annually, as it becomes payable. The coupons are appendages to the bonds for convenience in receipting for interest paid, and also as evidence to the purchaser of the bonds of the non-payment of any previous interest; and they pass by assignment of the bond to which they are attached. They had no legal force or validity at their inception independent of the bonds; and it is upon the bonds alone that the interest is recoverable. They draw the attention of the court directly to the bond, to which they are attached, as the original contract. The bonds are special contracts of a city, in pursuance of a local law, for a local and specified purpose, which the court must disregard in pronouncing the coupons negotiable paper payable to anybody, and recoverable by the holder, while they continue annexed to the bonds.

For these reasons the evidence is rejected and the suit dismissed.

If the coupons are so made as to be separable from the bonds and negotiable, the owner can sue on them without producing the bonds, or being interested in them. Thomson *vs.* Lee County, 3 Wallace, 327; Clarke *vs.* City of Janesville, 10 Wisconsin, 136; City *vs.* Lamson, 9 Wallace, 477. Coupon disconnected from bond is not negotiable, unless such intention appears on its face. Myers *vs.* York and Cumberland Railroad Company, 43 Maine, 232; Crosby *vs.* New London, &c., Railroad Company, 26 Connecticut, 121.

Coupons may be detached from the bonds which they accompany, and transferred or recovered on, without production of the bonds or showing title to them. National Exchange Bank *vs.* Hartford, &c., Railroad Company, 8 Rhode Island, 375; McCoy *vs.* Washington County, 3 Wallace, Jr., 381; Commonwealth of Virginia *vs.* Chesapeake, &c., Canal Company, 32 Maryland, 501;

Burroughs *vs.* Richmond County, 65 North Carolina, 234; Knox County *vs.* Aspinwall, 21 Howard, 539; Murray *vs.* Lardner, 2 Wallace, 110; Thomson *vs.* Lee County, 3 Wallace, 327.

All persons must inquire into power of corporation to make contract and authority of its officers. Hodges *vs.* Buffalo, 2 Denio, 110; Taft *vs.* Pittsford, 28 Vermont, 286; Leavenworth *vs.* Rankin, 2 Kansas, 357; Baltimore *vs.* Reynolds, 20 Maryland, 1; Wallace *vs.* San Jose, 29 California, 180; State of Maryland *vs.* Kirkley, 29 Maryland, 85,111; State *vs.* Haskell, 20 Iowa, 276; Bridgeport *vs.* Railroad Company, 15 Connecticut, 475; Baltimore *vs.* Eschbach, 18 Maryland, 276; Dill *vs.* Inhabitants of Wareham, 7 Metcalf, 438.

Consult Mygatt *vs.* City of Green Bay, *post p.* 292; Luling *vs.* City of Racine, *post p.* 314; Goedgen *vs.* Supervisors of Manitowoc County, June Term, 1870, to appear hereafter in this series; and for a full citation of authorities on the question of municipal bonds, see Schenck *vs.* Supervisors of Marshall County, October Term, 1866, to appear in subsequent volume of these reports.—[*Reporter.*

THE JOHN RICHARDS.

CIRCUIT COURT.—DISTRICT OF MICHIGAN.—JUNE TERM, 1856.

IN ADMIRALTY. ON APPEAL.

MARITIME LIEN.

1. PARAMOUNT TO STATE LIEN.—A maritime lien on a vessel is paramount to a domestic lien, under the statute of a state, of subsequent date. And if a judgment and sale take place under the statutory lien, it will not displace or affect the prior lien.

2. The vessel in the hands of such purchaser is subject to the prior lien.

3. NEITHER CAN BE PLEADED IN ABATEMENT.—As the liens set up are distinct, the plaintiffs being different, neither of these suits can be pleaded in abatement to the other.

4. NOT BARRED.—Though the statute declares that all claimants may come in, and that all liens not presented are barred, this cannot affect a maritime lien.

5. JURISDICTION.—The purchaser, under the statute lien, could not object to the jurisdiction of the admiralty court, as the suits and rights of the parties are distinct.

The facts are stated in the opinion.

Alfred Russell, for libellant.

Simon Towle, for respondent.

McLean, J. This is an appeal in admiralty. Riggs, a citizen of Michigan, filed his libel, June 25th, 1855, for supplies furnished the schooner, John Richards, in a home port. Among other intervening libellants, J. Brayman, a citizen of Ohio, a material-man, filed his libel in the district court, September 8th, 1855. The marshal seized the vessel and made the usual return, "held in custody until the further order of the court." No person interposed a claim. Proclamation was made, order of reference, &c., and the vessel was condemned and sold the 24th of December, and the claimant became the purchaser.

The respondent's title is set up under a bill of sale from the sheriff of the county of Wayne. This sale was founded on a procedure of a circuit court commissioner under the 122d chapter of the revised statutes of Michigan, of 1846, for the enforcement of a lien on the vessel for repairs, &c., at the home port. The lien under which the libel was filed, was prior to that at the home port and was incurred at Toledo, in the state of Ohio, which was a foreign port, in a procedure of the admiralty.

The vessel was seized by the sheriff before it was taken into custody by the marshal, of which the marshal had no notice, and the sale of it by the sheriff was prior in time to the sale of the marshal, both being made on the 24th of December, 1855.

A question was made and argued at the hearing, as to the admissibility of certain papers, to show the procedure before the commissioner. If the proceeding of the commissioner was legally a matter of record, the proof would be defective, but from the view I take of the case it is unnecessary to decide this question.

The first section of the act gives a lien against all vessels which navigate the waters of the state, for supplies, repairs, &c. After the seizure of the vessel, twelve weeks notice is to be given, and all persons who have any demands against such

vessel, under the provisions of this chapter are required to deliver an account of their respective claims, to the officer within three months from the publication of notice, and any lien, under the statute, if not presented within the time, ceases.

This proceeding is in the nature of an attachment, in which all the creditors under the act may come in and prove their debts; and if bond and security shall be given to pay the creditors, the vessel shall be released. The 7th section of the act declares that a second warrant shall not issue against the same vessel. The 36th section provides, that the procedure, shall not be instituted against any vessel which has been seized under process of the courts of the United States, nor against any vessel which has been sold by order of such courts, except claims which originated subsequent to such sale.

That there is under the maritime law, a lien on the ship for materials furnished or repairs, is too well established to be controverted. And that this lien does not depend upon the possession of the vessel as a common law lien, is also clear. In the case of *The General Smith*, 4 Wheaton, 443, the court held that this lien did not attach to the home port of the vessel. This was a distinction not found in the maritime code, and was no doubt adopted from deference to state regulations. Still a domestic lien at the home port of the vessel may be enforced under a maritime jurisdiction.

It is conceded in the case that the lien of the libellant was prior to the lien of the the respondent, under the Michigan statutes. But as the property was first seized under the statute, it is contended that the subsequent seizure by the marshal was illegal, and consequently that the district court had no jurisdiction of the case.

No procedure under the statute of seizure or sale, could affect the lien of the libellant. The claim of the respondents was distinct from that of the libellants. The sale of the sheriff was subject to the prior lien. In the hands of the purchaser under the sheriff, the vessel was liable to the claimant, and he could have enforced his lien.

The statute provides that all claimants may come in, as under an attachment and have their rights adjusted. But this is limited to claims under the statute, and did not embrace the claim of the libellant. All liens under the statute which are not presented, are barred expressly by it. No one, it is supposed, will contend that the statute embraces a maritime lien, or that the legislature had power to regulate such a lien. The rule is different in a court of admiralty. All who have an interest in the vessel may come in and be made parties and their rights will be protected. In the present case, the respondent could have exhibited his claim, and it would have been decreed subject to the satisfaction of the prior lien. But the respondent did not intervene, though he had actual notice of the admiralty procedure. He stands upon his purchase under the sheriff's sale, which did not displace the lien of the claimant. Such sale was no bar to the libel suit, and consequently the title of the respondent is unsustainable against that of the libellant.

The force of the respondent's right must rest on the alleged illegality of the procedure by the marshal. The principle is admitted, that where there is a concurrent jurisdiction the pendency of the suit may be pleaded in abatement in the suit subsequently commenced. But in these cases there is no conflict of jurisdiction. The suits are distinct, by different plaintiffs, and for distinct causes of action. The only thing common to both actions is a lien of each on the same vessel. But here there is no conflict, as all must admit that the prior lien, must be first satisfied, and that the claimant by the first lien is not disputed.

No impropriety is perceived in the arrangement between the marshal and the sheriff, to hold the property under the circumstances, subject to the right of the parties. Neither party claimed the vessel, but an interest in it, which was a mere lien, and the only question is, whether the maritime court had jurisdiction. If it had, there is an end to the controversy, as it proceeded on the paramount lien. There is nothing on the face of the record to raise a doubt as to the

jurisdiction. No plea was filed to the jurisdiction, and the facts stated on the record show affirmatively, that there was jurisdiction. In such a case, the truth of the record cannot be questioned, nor its irregularity.

The decree of the district court is affirmed, with costs.

See The Globe, 2 Blatchford, 427; The steamboat N. W. Thomas, *post p.* 210, and cases there cited; also The Skylark, December term, 1870, in subsequent volume of these reports, and cases there cited.

The statute of New York was not intended to impair maritime liens, if it were, it would be nugatory. Such liens are beyond the reach of state legislation. The Barque Chusan, 1 Sprague, 39.

The purchaser of a boat, sold by order of a state court, takes it subject to any existing liens. McAllister *vs.* Steamboat Kirkman, 1 Bond, 369.

It is proper that the sheriff should yield to the marshal; but if the marshal do not serve his warrant, by taking possession, this court does not take jurisdiction; the practice is to wait until the sheriff's custody has ceased,—a sale by the sheriff does not effect a subsequent sale under order of the court in admiralty. The Julia Ann, 1 Sprague, 382. The same doctrine announced in The Gazelle, 1 Id., 378; and in the Oliver Jordan, 2 Curtis, 414.—[*Reporter.*

THE DELAWARE.

CIRCUIT COURT.—NORTHERN DISTRICT OF OHIO.—JULY TERM, 1856.

IN ADMIRALTY. ON APPEAL.

COLLISION.

1. CONFLICTING EVIDENCE.—In cases of collision, the hypotheses and evidence of the respective parties are generally inconsistent.

When there is a change in the course of a vessel, a person without a compass, standing on the deck of either cannot, generally, say whether the change has been made by the vessel on which he stands, or the one on which his eye is fixed.

2. DUTY OF VESSELS MEETING.—A vessel that has the wind free, or is sailing before or with the wind, must get out of the way of the vessel close-hauled or sailing by or against it; and the vessel on her starboard tack has a right to keep on her course.

3. DUTY OF STEAMER.—So a steam vessel must get out of the way of a sail vessel, on the same principle, that the steam power gives the control of the vessel, as a vessel with the wind free. The exact variations of a vessel, from her general course, can only be known by the compass.

Where the light of a sail vessel appears to a steam vessel, at a distance of three or four miles, such light should be observed closely, in order that the steamer may avoid the vessel which carries it.

The steamer is bound to port its helm, and make way for a sail vessel where there is the least possibility of danger.

It is negligence in the steamer not to guard against the contingencies of a shifting wind, and the accidents to which a sailing vessel is liable; the point of danger is not passed until the vessels have passed each other. And although such vessel may change its course from apprehension of danger, the steamer is in fault for not keeping out of the way, although the sail vessel may not be faultless. In such a case there is a mixed fault, and the damage done from a collision should be divided between the parties.

4. TRINITY RULES DEFECTIVE.—The trinity rules, sanctioned by the Supreme Court, were designed chiefly for the government of vessels on the Thames, and in their application in this country are defective. The defects consist in the conditional application of the rules. Some instances stated.

A rule of navigation should be simple, plain, and absolute.

Appeal from decree of District Court.

The facts appear in the opinion.

Spalding & Parsons, for libellant.

Carter & Morton, for respondent.

MCLEAN, J.—The libellant states, that on the 11th of June, 1855, at half past eight o'clock in the afternoon, the schooner E. M. Lyon sailed from Cleveland, loaded with one hundred and forty tons of coal on a voyage to Toledo; that about fifteen miles westerly from Cleveland, at about half past two o'clock at night, she was run into and sunk by the propeller Delaware, which caused the loss of the schooner and her cargo. The propeller was on her course from the Middle Ross Island to Cleveland.

The hypotheses of the respective parties are inconsistent with each other, in each charging the other with being the cause or the collision; and as usual in such cases, the officers and crew of each vessel, in their evidence, sustain the assumptions of

each. This conflict of testimony in collision cases is not supposed to arise, altogether from a disposition to misrepresent the facts in justification or excuse of their own conduct; but from the uncertainty of the course and position of the vessels, before and at the time of the collision. No one standing upon the deck of a vessel, without a compass, can observe a small deviation from its general course. An experienced seamen having a fixed object ahead, by ranging with certain parts of the vessel, or from the stars, may see where deviations are made; but the changes cannot be noted with mathematical precision. Much less certainty can be attained, when the object ahead is a moving vessel. Whether a perceptible change in the course is caused by the vessel on which the observer stands, or the one on which his eye is fixed may be a matter of doubt. This difficulty is greatly increased at night when the wind is fresh, as the waves have some effect on a vessel propelled by steam, and a much greater effect upon a sail vessel. The lights of vessels at night may show their relative positions, but without reference to the compass they do not indicate the precise course of either.

It may be proper here to state the rules recommended by the trinity masters in England, and approved by the Supreme Court in the case of *St. John vs. Paine, et al.*, 10 Howard, 581. "A vessel that has the wind free or sailing before or with the wind, must get out of the way of the vessel that is close-hauled or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. So when two vessels are approaching each other, both having the wind free and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side abaft the beam or near the stern, in that case the vessel on the

starboard tack should give way, as she can do so with greater facility and less loss of time and distance than the other. Again when the vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on her larboard tack should bear up or keep away before the wind." A great many authorities are cited in the above case, as sanctioning these rules.

In a conflict of testimony, the number of witnesses on the respective sides may not be wholly disregarded; but there are often circumstances which should have a more controlling influence than the fact of numbers. Respectability of character, as is sometimes perceived from the manner of relating facts, a favorable position for observation, the danger apprehended at the moment, and the admissions of the parties must all be duly considered.

The crew of the schooner consisted of some six persons, the master, mate, cook and three persons before the mast. These witnesses agree in saying the night of the collision was bright and starlight, that about midnight Thomas R. Willis, the mate, took charge of the larboard watch, relieving the captain, who directed the course of the vessel should be west by north as long as the wind held on at the southward. A man by the name of Allen was at the helm, Nicholas Burke, the captain's brother was also on deck.

At about two o'clock a light breeze blew from the northward, the schooner was steered west-north-west, and run at the rate of two or two and a half miles an hour. At about a quarter after two, a bright light was made, a point over the starboard bow of the schooner, and in about five minutes after, a green light was seen, from which the approaching vessel was known to be a steamer going to the eastward. While these lights bore about a point forward of the beam of the schooner, that is, north by east, it is supposed to have ported its helm as its red light was seen. It then run heading for the midships of the schooner, on the starboard side. The propeller was hailed twice, but no answer was given. The schooner's helm

was put hard a-port, so that the collision might take place as far forward as possible. A voice was then heard from the propeller, saying, "hard a-port." The propeller, in attempting to cross the bow of the schooner, stem on, at full speed, struck the schooner abreast of the starboard catheads, forcing the forecastle in, glancing forward, separating the stern from the timbers, taking the bowsprit and knightheads away, and turning the bow of the schooner toward the shore. The captain of the schooner saw the propeller approach the schooner nearly at right angles on her starboard bow, and strike her near the catheads. She sunk in sixty feet of water. These facts are substantially corroborated by the other witnesses on board the schooner.

The course of the schooner, as stated by Allen, the helmsman, was west by north, the wind then headed her off to the north-north-west, and then died away so that the boom swung midships. She then lost her steerage way, and swung round about north. In a few minutes the wind rose from the north-north-east, then changed the course to west by north, and shortly afterwards to west-north-west.

The respondent's witnesses are in conflict with those of the libellant. The propeller was on a voyage from Toledo to Buffalo, by the way of Cleveland. Her helmsman says his course was east by south. He took the helm of the propeller about midnight, and remained at it until after the collision; and he says he did not deviate from the course stated more than the sixteenth part of a point, by the compass, until he was ordered to port, to avoid the collision. This statement is corroborated by Captain Dixon, and other witnesses on board of the propeller. In regard to both vessels, witnesses who did not examine the compass must have spoken of the course from the report of the helmsman, or their own general observations.

When the schooner was first descried on board of the propeller, it was one point or a half point on its starboard bow, which shows that the schooner was south of the course of the propeller. This relative position of the schooner is corroborated by the mate of that vessel. He says they made the

bright light of the propeller one point over the starboard bow of the schooner, when she was four or five miles from the propeller. When the helmsman of the schooner first saw the light of the propeller, it was at the distance, as he supposed, of about a half or three-quarters of a mile. All the witnesses agree that when the light of the schooner was first discovered, she was south of the propeller. But it is contended that the schooner materially changed her course, which was the cause of the collision.

The witnesses do not differ as to the position of the vessels, when the conflict occurred. The schooner was struck on her starboard bow, so that the vessels, if not at a right angle to each other, must in some degree have approached that attitude. But which vessel was out of its path, or whether both are chargeable with a deviation, is the point in controversy. If the propeller were to the northward of the path of the schooner, and attempted to cross it, the collision might occur; and so if the schooner were north of the path of the propeller, and attempted to cross it, a similar result might follow. And the colliding vessels would appear to the witnesses on their decks respectively as they have sworn.

Captain Dixon of the propeller says, when he first saw the light of the schooner, it bore a half point on his starboard bow. From an observation, he saw the light was carried by a vessel on her samson post, which, as the wind was, would frequently be obscured by her jib. The light very soon changed to the port bow of the propeller; it was unsteady. But the light steadily opened to port, until it made three or four points oft the port bow of the propeller. He then considered there was no danger of a collision. He did not order the helm a-port half a point, as was his custom in meeting a vessel, as the schooner was steering clear of the course of the propeller. Feeling chilly, he stepped into his room for his overcoat. He soon heard Austen, the mate, who was on the pilot house, order the helm to be ported; and looking out, he saw the light of the schooner was again closing on the propeller. On passing rapidly to the upper deck, the light on the approaching

vessel shone steadily, so that the light must have been to the windward of the jib, and the vessel must have been crossing the path of the propeller. He saw the sails of the schooner, which convinced him that he was not mistaken as to her course; and that there was danger of a collision. He then rung the bell to slow, and another to stop, and a third to reverse the engine, all of which orders were promptly obeyed. At this time, he heard an order on board the schooner, hard up, which as the wind then blew, was hard a-starboard. When witness first discovered the light of the schooner, she was at a distance of some four or five miles. The other witnesses on board the propeller corroborate this statement. Some of them suppose the course of the schooner was west-south-west, or south-west by west, and others, south-west or south-west by south, which would be a deviation of six points from west by north, the course of the schooner as sworn to by her helmsman.

When a collision is apprehended, it is natural to suppose that the eye of the helmsman is fixed on the appoaching vessel, and not on the compass. Under such an exigency, I cannot receive without allowance a statement as to the precise course of the vessel, given by the pilot. He must generally, if not uniformly, speak from the recollection of the general course of his vessel, and from the orders given to port the helm. There is still greater uncertainty, when a witness on one vessel describes the course of another.

The pilots on the respective vessels had the best means of knowing their courses, and it appears from their statements that, at the time of contact, the propeller was running nearly south-east by east, and that the course of the schooner was west-north-west. Had the officers of both vessels desired a collision, I doubt whether they could have brought it about with more certainty than by the means used. The vessels approaching each other very near, the propeller changed her course two points to the right, and the schooner two points to the left, which changes from the position of the vessels could only extend the angle of contact. From the difference in the speed of the vessels, it would require a nice calcula-

tion, and no inconsiderable seamanship to bring them into a collision, under the circumstances. Whilst there is no ground to suspect a design to bring about a collision by the officers of either vessel, yet by the evidence, negligence, or a want of skill is shown.

It was the duty of the propeller, as a steam vessel, to keep out of the way of the schooner. Her light was seen by the officers of the propeller, at least, when the vessels were from three to four miles apart. Had her helm been ported, as her captain says was usually done in meeting a vessel, and her course continued, there would have been no collision. The excuse that the light of the schooner on the larboard bow of the propeller showed that there was no danger, is not sufficient. That light should have been closely and continuously observed. There was a breeze of at least five knots an hour from the north-north-east, and the wind was flawy. It was negligence not to guard against the contingencies of the shifting wind, and the accidents to which a sail vessel is liable. In such a case, the point of danger is not passed until the vessels have passed each other.

After it was observed that the light of the schooner opened upon the propeller, there was sufficient time to avoid the schooner, by putting the helm of the propeller hard a-port. And it is highly probable, had the propeller continued her course, instead of slowing and reversing her engine, she would not have struck the schooner. The damage done to the bow of the schooner, and turning it to the shore, shows that the propeller, when she struck her, must have had a strong headway.

But was the schooner free from fault? I think she was not. Her duty required her to keep on her way, and if she had done so, in all probability the propeller would have passed without touching her. But instead of doing this, on the approach of the propeller, her pilot turned her two points to the left. This increased the danger, and required a greater effort by the propeller to avoid her. And although I think under the rules of navigation above stated, the propeller being a

steam vessel, having timely notice of the approach of the schooner, was bound to keep out of her way, which she might have done with ordinary care; yet the schooner cannot be held faultless, as she deviated from her course, and, in some degree, contributed to the collision. The decree of the district court, which held both vessels to have been in fault, is, therefore, affirmed with costs.

I take occasion here to state my view of the rules of navigation, as given by the trinity masters, and sanctioned by the Supreme Court.

The trinity rules were designed chiefly, to govern vessels in the River Thames; and that their observance has been salutary in the navigation of that river, is undoubted. And the same rules are applied, especially in this country, to sea and lake navigation. But, from the experience I have had in collision cases, I am convinced they are defective. The defects consist in the conditional application of the rules. As, for instance, "The vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way or be answerable for the consequences." Now the duty here enjoined depends upon the relative position of the vessels; and the masters of the vessels must decide. If the position of either vessel do not come within the rule, it is not obligatory on such vessel. The safety of the vessel, the property on board, and the lives of the passengers, depend upon the decisions of the masters of the approaching vessels. There is but a moment for deliberation, and the danger is imminent. No persons who cannot look upon such a scene calmly, can act wisely.

The rules declare, "when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right." But what is to be done where the masters on the respective vessels

differ as to which vessel is on the larboard tack, and where both vessels have not the wind free?

Again it is said, "the same rule governs vessels sailing on the wind and approaching each other, where it is doubtful which is to windward." The masters must solve this doubt.

But it is said, "if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side, the vessel on the starboard tack should give way, as she can do so with greater facility and less loss of time and distance than the other." May there not be doubt whether the vessel on the larboard tack is so far to the windward, that if they persist in their course the other will strike her, and if so, is the vessel on the starboard tack to give way?

And again, "when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on her larboard tack should bear up or keep away before the wind." Here is a doubt to be solved, as to which there may be a difference of opinion.

It should be recollected that these rules must be often acted upon at night, in a rough sea, when nothing can be seen of the approaching vessels but their lights; and unless there be a concurrence of judgment in the masters of both vessels, an attempt by one of them to follow the direction, without the concurrent action of the other, is more likely to produce a collision than to avoid it. In almost every case of collision that I have investigated, the master of each vessel has mistaken the position and course of the other, and when a collision occurs, the one vessel is charged with having changed its course, and run into the other. Such is the case now before me.

In my judgment a rule of navigation to be effective, must be simple and absolute. It must be so plain as not to be mistaken by a man who knows his right hand from his left; a rule which may be carried out in storm and darkness, if the lights of the vessels be perceptible: a rule with exceptions, prac-

tically, is no rule. If an exception be made, I have investigated no case of collision where it was not relied on as an excuse or justification. I speak of cases where thousands of lives have been jeoparded, and hundreds have been lost.

It appears to me the following rule, if observed, would be effectual to prevent collisions. "Vessels approaching each other from opposite directions, shall turn to the right." And that this rule shall apply to all vessels, whether propelled by steam or wind.

If it be objected that a vessel close-hauled or sailing against the wind, may not obey her helm, I answer that the master of the approaching vessel can be in no doubt as to the intention of the vessel so situated. Almost all collisions which occur, are attributable to doubts as to the course of the approaching vessel. Make this course certain, without condition, and the evil will be remedied. If a steamer, from any cause, should be unable to turn to the right, her engine should be stopped, until the approaching vessel shall have passed. If two steamers are moving in a direction so as to cross each other's path, and they should come so near as to apprehend danger, the engines of both should be stopped.

No man who stands upon the deck of a sail vessel or steamer, can be so ignorant as not to understand and carry into effect the above rules, and if this were done, I am persuaded that the collisions which so often occur would be avoided.

As to duty of steamer in approaching a sailing vessel, see The Pilot *post* p. 159, and cases there referred to. Baker *vs.* Steamship City of New York, 1 Clifford, 75; Wakefield *vs.* Steamer Governor, Id., 93; Pope *vs.* The Steamboat R. B. Forbes, 1 Clifford, 331; The Wings of the Morning, 5 Blatchford, 15.

That a vessel having the wind free must give way to one close-hauled, The Brig Emily, Olcott, 132, and without regard to their respective tacks; The Pilot-boat Blossom, Id. 188.

Where a steamer discovers the light of an approaching sail vessel, and then loses sight of it, it is her duty to check her speed, and even to stop if need be, until she again discovers the light. The Illinois, 5 Blatchford, 256.

A sailing vessel discovering the lights of a steamer nearly ahead, on a dark and cloudy night, has no right afterwards to change her course, on the idea that she has not been seen by the steamer. The Scotia, 5 Blatchford, 227.

In the case of The Osprey, 1 Sprague, 245, is a full discussion of the law of

collision and the duties of approaching vessels, also in the steamboat New Jersey, Olcott, 415.

For an elaborate discussion of the law of collision, the rules of navigation, lights, and signals, duty of steamers and sailing vessels, see 1 Parsons on Shipping and Admiralty, 525-595, and voluminous authorities there cited.—[*Reporter.*

FOSS *vs.* HERBERT.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1856.

1. A claim in a patent for an entire machine does not deprive the patentee of his right to claim the parts also.

2. It is not necessary, to constitute an infringement, that the whole machine should be used. If either one of the parts claimed is used in substantially the same manner in a similar machine, it is an infringement.

3. It is not material what the *theory* of the patentee, in regard to his invention, may be; but, the question is, do the tools used by the defendant act substantially in the same manner, and produce substantially the same result as those of the plaintiff?

4. The drawings are a part of the description of the thing patented, and are to be considered with the specification.

5. A man may improve a patented machine so as to entitle him to a patent for his improvement; but that will not give him the right to use the invention of the first patentee without his license.

6. The question to be determined on the issue of infringement, is, whether under a variation of form, or, by the use of a thing which bears a different name, the defendant accomplishes, in his machine, the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure and purpose.

7. If the change introduced by the defendant (as, for instance, the substitution of the spring for the roller) constitutes a mechanical equivalent in reference to the means used by the patentee; and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, (as, for instance, the effect claimed in its action on winding or warped boards) it will still be an infringement, as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention.

8. It is of no consequence, with respect to the question of infringement, whether the cutters of the defendant are like or unlike the plaintiffs' in respect to their cost, adjustability, mode of sharpening, or any other peculiarity of con-

struction, provided that, notwithstanding such difference of construction, they are in their mechanical action, operation, and effect in the combination, the same with those of the plaintiffs.

This was a special issue out of chancery, tried by Judge Drummond and a jury, to determine the question of the infringement of the tonguing and grooving combination set forth in letters patent granted to William Woodworth, December 27, 1828, for a "new and useful improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick and cutting mouldings on, or facing metallic, mineral, or other substances;" extended by the Board of Commissioners for seven years, from December 27, 1842, extended by special act of Congress passed February 26, 1845, for seven years from December 27, 1849, and reissued July 8, 1845.

The defendant's machine was known as the "Norcross Tonguing and Grooving Machine," employing a pressure spring, bearing down upon the face of the board at points between the axes of the tonguing and grooving cutter wheels, together with front and rear rollers for feeding, which rollers were pressed down with adjustable springs or screws. The cutter wheels consisted of circular plates cut as one plate out of the solid metal, and secured together upon the spindle with four, six, ten, and twelve teeth projecting from the periphery of the plate, (called, by the defendant, circular saws) and designed for cutting the tongue and groove.

S. A. Goodwin & E. C. Larned, for plaintiffs.

George Herbert & Grant Goodrich, for defendant.

DRUMMOND, J., charged the jury as follows:

This case comes before you on an issue from the chancery side of the Court, to determine a question of infringement. Only one question is submitted to you by the Court.

This is the sole question you have to consider, and in this respect you have no discretion. It is whether the machine of the defendant is an infringement on the machine of the plaintiffs', and if so, in what particular?

You will therefore throw out of view all questions as to the originality or novelty of the Woodworth machine. These questions are not before you, and are not left to you, and you must pay no regard to them.

They were not left to you, because they had been tried over and over again in nearly all the circuits of the United States, and as far as the novelty and originality of the patent are concerned, have been in every instance decided in favor of the patent, and it seemed an unnecessary consumption of time to investigate these matters again.

The defendant has used a machine which the plaintiffs allege is an infringement in whole, or in part of the Woodworth patent.

The first point to determine is the proper construction of the patent and specifications. This is matter of law, and you are to take the law as laid down by the Court, as obligatory and controlling upon you whatever your own opinions may be in regard to it.

The original patent was granted in 1828. In the original specifications, Woodworth disclaims the invention of circular saws or cutter wheels. He claimed his improved method of cutters for tonguing and grooving. In 1845, the patent was re-issued with amended specifications.

It is this amended patent which governs the rights of the plaintiffs and defendant. In this re-issued patent the invention is described as a machine for planing, tonguing, and grooving boards. The patentee claims as his invention:

First. The planing cylinder in combination with the pressure rollers.

Second. The combination of the planer with the revolving cutter wheels for tonguing and grooving. With these two claims we have nothing to do, as it is admitted that the planer is not used by the defendant in his machine.

Third. The combination of the tonguing and grooving cutter wheel with the pressure rollers, so as to tongue and groove boards in one operation, as described.

Fourth. The combination of either the tonguing or gooving cutter wheel with the pressure rollers as described.

It is in relation to these two claims that the controversy arises. My views of the law governing the construction of this patent are expressed in *Moody vs. Fiske*, 2 Mason, 112.

I understand that Woodworth claimed an entire machine, and certain combinations of parts of it, which went to make up the entire machine. And for the purpose specified, it is a valid claim. The third and fourth claims are valid claims under this issue, being parts of the combined machine specifically claimed, and a claim of the whole did not deprive him of his right to claim the other parts also. He claims combinations of different things which go to make up the entire machine, which entire machine consists of various parts, and each and all of which he claims as his invention.

Now, it is not necessary that the entire machine should be used to constitute an infringement of the patent; if any one of the parts claimed is used in substantially the same manner in a similar machine, it is an infringement. No person could take out the planer and use the rest, and thereby escape a violation of the patent.

There still remains, after the planer is removed, combinations which Woodworth claims to have invented, and although the planer is gone, it is still the Woodworth machine, shorn only of its planer, and the Woodworth combination for tonguing and grooving, remains.

Is the defendant's machine substantially like the plaintiffs' after the planer is removed from the latter? If it is, it is an infringement.

In a patent for a combination there can be no infringement, unless all the material parts entering into the combination are used. You may use the parts provided you do not use the combination.

Thus there is in this case no infringement by using the

cutters or the rollers alone, but they must be used in the same combination as in the Woodworth machine, as described in the patent,—that is the one in combination with the other,—to constitute an infringement. There are two particulars in which the alleged infringement consists. I do not see that there can be any controversy in regard to the two outside rollers in either machine.

The fact that one is weighted with levers, and the other with springs, makes no difference,—they both operate as feed and pressure rollers.

The two particulars in which the alleged infringement is claimed to consist are,

First. In the use of cutter wheels.

Second. In the use of the spring.

Now it is not necessary that the defendant should use the entire machine.

It is only necessary that he should use the combination as it is described in the patent, but it must be the identical combination described. With this view other machines have been admitted in evidence. If prior machines were in existence at the time of the Woodworth patent, the only ground on which that patent could be good would be that it was different from such prior machines. It is for you to say whether the machine of the defendant is identical with those prior machines or not. Woodworth does not claim the art or result of tonguing and grooving boards, but only the mode in which he did it. Any person can use any other machine not identical with Woodworth's.

His claim is limited to the method described.

The patent claims that the pressure rollers in this combination have the effect to hold the board steady and prevent its being drawn into the axes of the cutters. It is not material what the theory of the patentee was on this point.

Do the tools used by the defendant act substantially in the same manner, and produce substantially the same result as those of the plaintiffs? If the springs do produce substantially the same result, so that one is a mechanical equivalent for the

other, then they infringe, and the same rule applies to the cutters. If the cutters of the defendant produce substantially the same result, in substantially the same way, so that the one is a mechanical equivalent for the other, then it is an infringement.

If you believe that the defendant's cutters operate differently on the boards from the Woodworth, that is an important consideration with reference to the question of their identity with those of the plaintiffs. They must not only produce the same result of tonguing and grooving, but they must do it in substantially the same way. You will determine,

First. Whether these springs are mechanical equivalents for the pressure rollers of the plaintiffs.

Second. Whether the cutters or saws of the defendant are mechanical equivalents for the cutter wheels of the plaintiffs, and whether the two are used in combination with each other in substantially the same manner as in the Woodworth machine. The drawings are a part of the description of the thing patented, and are to be considered in connection with the specifications.

An infringement of a patent takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. A man may improve a patented machine so as to entitle him to a patent for his improvement, but that will not give him a right to use the invention of the first patentee without his license.

A machine is an infringement of another if it incorporate in its structure and operation the substance of the invention,—that is, by an arrangement of mechanism which performs the same service, or produces the same effect in the same way, or substantially the same way. Mere colorable alterations, or adroit evasions, by substituting one mechanical equivalent for another in the combination which constitutes the machine, should never be allowed to protect a party.

The question whether one thing is a mechanical equivalent for another is a question of fact, depending on the testimony of experts, on an inspection of the machines, and it is an inference to be drawn from all the circumstances of the case by attending to the consideration, whether the contrivance used by the

defendant is used for the same purpose, performs the same functions, or is applicable to the same object as the contrivance used by the patentee.

The question to be determined is, whether, under a variation of form, or by the use of a thing which bears a different name, the defendant accomplishes, in his machine, the same purpose, object or effect, as that accomplished by the patentee, or whether there is a real change of structure and purpose.

If the change introduced by the defendant (as, for instance, the substitution of the spring in the place of the roller) constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent, it accomplishes as is claimed, some other advantage beyond the effect or purpose accomplished by the patentee,—as for instance the effect claimed in its action on winding or warped boards, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention. It is of no conseqnence with respect to the question of infringement, whether the cutters of the defendant are like or unlike the plaintiffs' in respect to their cost, adjustability, mode of sharpening, or any other peculiarity of construction, provided that, notwithstanding such difference of construction, the cutters of the defendant's machine are, in their mechanical action, operation and effect in the combination, the same with those of the plaintiffs.

The only question for you to decide is, whether there has or has not been an infringement on the principles laid down by the court. You can find that the defendant has not infringed, in any respect, or that he has infringed, and in what particulars he has infringed.

The jury found a verdict that the defendant infringed the combination of Woodworth for tonguing and grooving in the use of the pressure springs, and the rear rollers in combination with the cutters described.

BOWEN vs. CLARK.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—NOVEMBER TERM, 1856.

IN EQUITY.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment with preferences, made by two members of a firm, in the absence and without the knowledge or consent of the third, who had previously refused to give preference to any creditors, is not valid as to him.

2. He having repudiated the assignment, and with the aid of his partners and a mortgagee of a portion of the property regained possession of it, this court will not entertain a bill by preferred creditors to compel redelivery to the assignee.

3. Although in Wisconsin a mortgage of a retail stock, not duly filed, or accompanied with delivery of possession, is void as to creditors, a bill by preferred creditors against the mortgagors and the mortgagee, who is equally preferred, will not lie unles the mortgagee claims payment in full to their prejudice.

4. Where the principal assigning partner was, at the time of the execution of the assignment, laboring under the immediate effects of intoxication, well known to the assignee and the agent of the creditors procuring the assignment, the transaction will not be favored in a court of equity.

The facts are fully stated in the opinion.

Joseph A. Sleeper and *Finch & Lynde*, for complainants.

Bennett & Sloan, for defendants.

MILLER, J. This bill is filed by two firms,—Brown & McNamee, and Sachett, Belchor & Co., of New York, who are creditors of the firm of H. O. Clark & Co., which was composed of Clark, Smith and Justin. This firm being largely indebted, on the third day of July, 1854, an assignment of their stock in trade and choses in action and effects was made to Stevens in trust. The assignment is in the form of an indenture between Clark, Smith & Justin, partners, under the name, style and firm of H. O. Clark & Co., party of the first part and Charles Stevens of the second part, and it is signed,

with seals annexed, H. O. Clark, Ira Justin, A. Hyatt Smith by H. O. Clark, his partner, H. O. Clark & Co., Charles Stevens. The trust created is to convert all the assigned property into cash, and first to pay in full the claims and demands of Miller, A. Clark, Brewster and the two firms, complainants, and then all the remaining partnership debts, *pro rata.*

On the 19th of May, previous to the date of the assignment, Clark, Justin and Smith, by their attorney, Clark, under their respective seals, executed to Brewster a chattel mortgage of all their stock in trade in their store in Janesville, to secure the payment in six months of the nominal sum of $16,000, with a schedule of the goods annexed. This mortgage was to secure money loaned and to be loaned, as it might from time to time be required. The mortgage provides that "until default be made in the payment of the aforesaid sum of money, the party of first part to remain in quiet and peaceable possession of the said goods and chattels, and in the full and free enjoyment of the same, and until such demand be made, the possession of the party of the first part shall be deemed the possession of an agent or servant for the sole benefit and advantage of his principal, the party of the second part." Smith intending to be absent at Washington, had given to Clark a general power of attorney to transact his business in his absence. He was at Washington when the mortgage and assignment were executed.

In the month of June the firm of H. O. Clark & Co. transferred these goods and their book accounts and effects to Miller, and took his notes for the consideration, but in a few days after, this sale was rescinded, and the property was returned to the firm. In the meantime, Gilkison, the agent of Brown & McNamee, in the presence of Clark, urged Smith, who was then at Janesville, for security, which Smith declined. He was not willing to distinguish between or give preferences to any creditors of the firm. Clark and Justin were the active members of the firm, particularly Clark, and on Smith the credit principally depended. Clark had been drinking for two days before the execution of the assignment, with the knowledge

of the plaintiff's agent and of the assignee. And about the middle of the day, after he had slept off his intoxication, he, in their presence, examined the assignment and suggested the creditors to be preferred. He knew what he was doing, but the assignee thought he had better sign the paper before he got another drink.

Immediately after the execution of the assignment, the assignee took possession, and he continued in possession—selling goods at retail and collecting debts—until the thirteenth day of August. When the assignment was executed and the assignee was placed in possession, Brewster was absent. After Smith returned from Washington, he repudiated the assignment, and gave notice of it to the assignee, and he and the other members of the firm, with Brewster, the mortgagee, demanded of the assignee, and, on the thirteenth day of August, took the assigned property from the assignee, without opposition on his part, and he refuses to bring suit for the property, or its value, without indemnity against costs and expenses. While he had the property in his possession, he realized by sales and collections four thousand dollars. All the remaining property embraced in the assignment was taken from the assignee, he having united the stock of another store with the mortgaged stock in the Janesville store.

This suit is brought to enjoin the several members of the firm and Brewster, from using, selling, or disposing of the property embraced in the assignment, and to compel them to deliver said property to the assignee, so that he may proceed in the execution of the trust, and to account, and that the chattel mortgage to Brewster be decreed to be fraudulent and void.

It is well understood that a mortgage may be made to secure future advances, when this is a constituent part of the original agreement, and so recited. This mortgage did not contain such recital. What portion of the sum of sixteen thousand dollars had been advanced, or was owing, at the date of the assignment, is immaterial at this time.

By the statute law of this state, a mortgage of personal

property is not valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee, or unless the mortgage be filed in the office of the town clerk. This mortgage was so filed. But this is a mortgage of a retail store—the mortgagors continuing in possession, treating the property as their own, and retailing from day to day. By every sale and fresh supply, the mortgaged goods changed their identity. I have no doubt such mortgages are fraudulent as to creditors, and void as against executions and attachments. Whether the power of disposition exists on the face of the mortgage, or is so understood, or agreed between the parties at the time the mortgage is executed, or is fairly to be inferred from its provisions, it is equally void, although it may be filed with the clerk according to the statute. It is to be considered and treated as a means of hindering or delaying creditors.[1]

But this is not a proceeding of attachment or execution on the part of the creditors claiming adversely to the assignment. These plaintiffs claim under the assignment as preferred creditors, equally with Brewster the mortgagee. The demands of the preferred creditors are not specified in the assignment, but their whole amounts are to be first paid, or, in case of a deficit of assets, they are to be paid *pro rata*. These plaintiffs are not in a situation, at present, to contest the validity of the mortgage. Unless there be a deficit of assets, and Brewster claims payment in full, under his mortgage, to their prejudice, the validity of the mortgage cannot be questioned by them. The repudiation of the assignment, and the reclamation of the property, with the aid of Brewster, do not enable the plaintiffs to question the validity of the mortgage of a creditor equally preferred with themselves. By re-possessing themselves of the property, these parties made themselves trustees for the creditors, and they are bound to account, if the assignment is valid and effectual and should be enforced in a court of equity.

The assignment is signed by Clark as partner of Smith, not

[1] Griswold *vs.* Sheldon, 4 Comstock, 581; Truman *vs.* Ransom, 4 American Law Register, 693; Jordan *vs.* Turner, 3 Blackford, 309.

as attorney in fact, as the mortgage is signed. The power of attorney is not referred to, and it does not appear on its face to have been intended as an authority to Clark to execute the assignment, nor was it so considered by the parties.

It is a consequence of a partnership that each acting partner is a general agent of the firm,—that is, has an implied authority to act for the firm, in all business within the scope of the business transacted by it. In all that a firm has undertaken to do,or usually does, an acting partner is identified with the company. In the case of *Rogers vs. Batchelor*, 12 Peters, 221, Mr. Justice Story remarks: "The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself, and any disposition of those funds by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds for which the partner is responsible to the partnership; though in the case of *bona fide* purchasers, without notice for a valuable consideration, a partnership may be barred by such acts. Whatever acts, therefore, are done by any partner in regard to partnership property, or contracts beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner." One partner can, in the name of the firm, replenish the stock in trade, and even sell or dispose of it, in the usual course of the business. He can dispose of an article of the stock in trade in payment of a debt of the firm. He can mortgage the stock or dispose of a portion of it, to raise funds to preserve the credit, or to pay debts of the firm.

In the absence of a co-partner from the country, the acting partner may assign to a trustee for certain creditors of the firm, the cargo of a certain ship, and of certain debts, to raise funds in aid of the credit of the firm;[1] and under like circumstances, in the absence of one partner from the country who could not be consulted, an assignment of the whole property of the con-

[1] Harrison *vs.* Sterry, 5 Cranch, 289

cern, by one partner, was held valid by Marshall, C. J., in *Anderson & Wilkins vs. Tompkins*, 1 Brockenbrough, 456. From the opinion in that case, it may be inferred that the Chief Justice was of the opinion, that the authority of the acting partner in this respect was unlimited, but there is no doubt that the fact of the absence of the partner in England controlled the decision, as he remarked, "It is true Murry (the absent partner) had a right to be consulted; had he been present, he ought to have been consulted. The act ought to have been, and probably would have been a joint act, but Murry was not present. He had left the country and could not be consulted. He had by leaving the country confided everything which respected their joint business, to Tompkins, who was under the necessity of acting alone." In the case of *Pearpoint vs. Graham*, 4 Washington, 132, Mr. Justice Washington remarked, that, "It may admit of serious doubt, whether one partner can, without the consent of his associate, assign the whole of the partnership effects otherwise than in the course of trade, in which the firm is engaged in such manner as to terminate the partnership. His assignment of all the effects to trustees for the benefit of the creditors of the concern, would seem emphatically to be of this character. Such is the obvious design, and such must be its necessary consequences"; and Mr. Justice Story, in his work on Partnership, § 101, note, on a review of the cases, concludes, that there is no small difficulty in supporting the doctrine even under qualifications, that one partner may make a general assignment of all the partnership property.

The authority in a single partner to dispose of partnership property is not an inseparable legal consequence of an interest in the partnership, but is an actual agency, implied from the supposed assent of the other members; an express notice, therefore, from one member of the firm, that he will not be bound by the act of another partner puts a stop to the implied authority.[1] This agency does not exist where the partners are present, or can be consulted.

[1] See 1 American Leading Cases, 292, and cases cited.

In *Anderson & Wilkins vs. Tompkins*, it is asserted that "this power would certainly not be exercised in the presence of a partner without consulting him, and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and perhaps to fix upon it the imputation of fraud. In this respect, every case must depend upon its own circumstances."

In *Deckard vs. Case*, 5 Watts, 22, an assignment by one partner directly to certain creditors to pay debts of the firm, after the other partner had left the country, was sustained, on the principle of an implied power of a partner to dispose of the whole partnership effects, as held in *Mills vs. Barber*, 4 Day, 428, and in *McCulloch vs. Summerville*, 8 Leigh, 415, and other cases; but the peculiar facts of such cases were urged in support of the decision.

In *Hennesy vs. The Western Bank*, 6 Watts & Sergeant, 300, the same principle was maintained in the case of a general assignment, with preferences, of partnership effects to trustees, executed by two of three partners, in the absence from the country of the third partner; but the absence and a power of attorney of the third party are recited as the authority under which they executed the assignment. But in the case of *Deckert vs. Filbert*, 3 Watts & Sergeant, 454, it is decided that one of a firm has not power to make an assignment of the effects of the partnership for the benefit of creditors, against the express dissent of his co-partner. That assignment was made after the dissolution of the partnership by advertisement, but the dissent of the non-assigning partner was the ground of the decision.[1] In *Hitchcock vs. St. John*, 1 Hoffman, 511, the assignment was made in New York, while the absent partner was in Georgia, and it was declared void. In *Dana vs. Lull*, 17 Vermont, 390, the assignment was declared void, for being made by one partner, who had the superintendence and care of the business, while the other partner, who resided in a different part of the state, was absent,

[1] See also Kirby *vs.* Ingersoll, 1 Harrington's Chancery, 172; Drake *vs.* Rogers, 6 Missouri, 317.

and was not consulted. In *Deming vs. Colt*, 3 Sanford's Rep., 284, and in *Hayes vs. Hayer*, Id., 284, assignments made by one partner without the knowledge or assent of the other partner, who was present, or might have been consulted, were adjudged void. So also in *Havens vs. Hussey*, 5 Paige, 30, an assignment to a trustee, for the benefit of creditors giving preferences of the stock in trade by one partner, while the other was objecting to it, was adjudged to be fraudulent as to that partner, and void. The chancellor expressed his satisfaction, "that such an assignment is both illegal and inequitable, and cannot be sustained."

The principle upon which an assignment by one partner in payment of a partnership debt rests, is that there is an implied authority for that purpose from his co-partner, from the very nature of the contract of partnership, the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid and binding on his co-partner. One member of a firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any of the partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in equal proportions. And no such authority as that can be implied. And in *Fisher vs. Currier*, 3 Law Rep., (N. S.,) 589, it was held that to support an assignment of the whole of the partnership property to a trustee, for the payment of debts by one partner or any number short of the whole, even without preferences, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners, or from their acts or declarations, either before or subsequent thereto, it must appear that it was executed with their assent, or by their authority.

The Court of Errors of New York in the case of *Mabbett vs. White*, 2 Kernan, 442, by a vote of five judges to two, expressed the opinion of the majority, that one partner had authority to sell and transfer all the co-partnership effects directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his co-partner, although the latter is at the place of business of the firm, and might be consulted, and that such transfer is valid, although the firm is insolvent, and thereby one creditor acquires a preference over the other creditors of the firm. This was in fact a controversy at law between creditors of the firm, and there was evidence, although contradictory, of the subsequent assent of the non-assenting partner. That decision virtually rejects the principle of implied agency, and in my opinion, it can only be sustained, if at all, upon the ground which was not stated by the majority, that in a controversy at law between creditors, one creditor cannot object to the validity of such an assignment to another creditor, but that the non-assigning partner alone can make the objection. Such is the law, in case of a judgment confessed by one partner against himself and his co-partners. The judgment is valid until reversed or set aside at the instance of the non-confessing partners, and a like sale under execution issued on such a judgment will vest a good title in the purchaser of the partnership property. Nor can third persons or creditors object to such judgment or sale.[1]

From an examination of the cases, it will be found that some peculiar and controlling circumstance influenced the decision. A distinction seems to exist in some of the cases between assignments directly to creditors in discharge of debts, and assignments to trustees, giving preferences to creditors. And if such distinction really exists, then there should be a difference in the effect given to the one in a suit at law between creditors, and to the other in a case of equity, by a preferred creditor against the non-assigning partner.

The property of a co-partnership upon the insolvency of the firm is considered in equity as a trust fund for the payment

[1] Grier *vs.* Hood, 1 Casey, 430.

of the partnership creditors generally, and equity should be slow to enforce an assignment at the hands of a preferred creditor. A court of equity will readily enforce the trust and grant relief in cases where the assignment is for the creditors generally, upon the favorite maxim that equality is equity. This principle of equality has always been a favorite with a court of equity, but it has not been adopted as a principle of the common law. This inequitable principle of the common law is, however, being modified by legislation. In the two great commercial states of New York and Pennsylvania, assignments with preferences to creditors are now prohibited by statute, and no doubt the prohibition will become general. Such assignments have only been tolerated upon the principle that the owner of the property has a right to make disposition of it in payment of his debts. The courts require that all assignments should be fair and *bona fide*, and not tainted in the smallest degree with fraud, and even then, such as give a preference to a creditor or creditors are not favored in a court of equity.

The principle to be extracted from nearly all the decisions, appears to be this, "that as a general assignment, if it does not dissolve the partnership, it at least takes away from the partners the right of disposing of the effects assigned, all the members, if they are present, have a right to be consulted on such a step; that an assignment by one partner against the known wishes of another would be a fraud upon him and invalid, and an assignment without his knowledge would be presumptively so.

But if one partner has left the country, he must be considered as having vested in the other implied authority to act in all matters for the benefit of the firm, and an assignment under such circumstances, if fairly made and beneficial to the interests of the company, will be sustained." 1 American Leading Cases, 444. Smith was not absent from the country, but he was at Washington, where he might have been written to, or seen personally in four days, or telegraphed to in one day. Especially was this the duty of the agent of the plaintiffs, and

Clark, as they had full notice from him of his objection to preferring any of the creditors of the firm. Smith's assent to the assignment was essential, under the circumstances, to its validity as to him. If he, on his return, had acquiesced in the assignment, he would be bound by it; but, on the contrary, he gave notice of his dissent to the assignee, and carried it out, with the aid of his co-partners and of the mortgagee, by regaining possession of the property. When Smith objected to giving these creditors security in preference to others, the property was in the possession of Miller, but the firm had then the avails of the sale to Miller, whatever they were. The return of the property by Miller to the firm does not vary the matter in the least, or justify the presumption, that Smith had come to any different conclusion upon the subject of a preference.

The assignment is valid as to Justin. And Clark's intoxication is not established by the proof to an extent that should authorize the court to pronounce the assignment void as to him. When he executed the assignment he knew what he was doing; he was not deprived of his reason or understanding. "Courts of equity as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practiced."[1]

It is not satisfactorily proved that imposition was practiced upon Clark by the plaintiff's agent, who procured the assignment, but he and the assignee had full knowledge of Clark's intoxication while the assignment was being written, and that he was laboring under its immediate effects at the time of its execution. They knew that Clark was acting in the matter for Smith, as well as for himself, and with due regard for the interests of Smith, they should have postponed the execution

[1] 1 Story's Equity, §231.

of the assignment until it could be done with care and deliberation, by a sober man. If this circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity.

My opinion is that the complainants have not a proper case for equitable interposition by this court, and that the bill should be dismissed.

For an extended discussion of the doctrine of assignments for the benefit of creditors, see opinion of STORY, J., in Halsey, *et al vs.* Whitney *et al*, 4 Mason 206.

See also, McGregor *vs.* Ellis, 2 Disney, 286; Graves *vs.* Hall, 32 Texas, 665.

One partner has no authority to make a general assignment of partnership property; Stein *vs.* LaDow, 13 Minnesota, 416; Hughes *vs.* Ellison, 5 Missouri, 463; Ormsbee *vs.* Davis, 5 Rhode Island, 442; Pettee *vs.* Orser, 18 Howard's Practice R. 452; Wilson *vs.* Soper, 13 Ben. Monroe, 411; Fisher *vs.* Murray, 1 E. D. Smith, 341; Kemp *vs.* Carnley, 3 Duer, 1; not even though the other partner be absent from the state, Hook *vs.* Stone, 34 Missouri, 329.

On the application of non-consenting partner, a receiver will be appointed, Welter *vs.* Schliper, 6 Abbott's Practice R., 123.

It has been held, however, that under certain circumstances one partner might make a valid assignment of partnership property for the benefit of creditors, without preference. Lamb *vs.* Durant, 12 Massachusetts, 54; Robinson *vs.* Crowder, 4 McCord, 519; Mills *vs.* Barber, Day, 428.

And in Forkner *vs.* Stuart, 6 Gratan, 197, it was held that a sale by one partner to a *bona fide* purchaser is valid though it convey the whole stock.—[*Reporter.*

THE PALMETTO.

District Court.—Northern District of Illinois. December Term, 1856.

In Admiralty.

1. In Chicago River, what too heavy a tow.—In a stream as narrow and crowded as the Chicago river, a tow of nine loaded canal boats is, under ordinary circumstances, too heavy for a tug; and although the tow is almost exclusively under the control of the tug, if the latter, being the agent of the boats, is overtasked, the boats must answer for the fault.

2. Duty of Moving Vessels.—It is the imperative duty of all craft navigating the river, to avoid coming in contact with vessels moored to the wharf, and in case of collision, the presumption is that the former is in fault, and, if they from carelessness, negligence, or want of skill, collide with a moored vessel, contributory fault of the stationary vessel does not excuse them.

3. Anchor—Where Proper Place.—A vessel lying at the wharf must have her anchor out of the way of passing vessels. If she allows it to hang at the hawse pipe, with the flukes below the surface of the water, where it sinks a colliding boat, she is in fault. She is also in fault for not dropping it on the approach of a vessel.

4. Though such a position of the anchor may meet the requirements of the city ordinances, it does not meet the demands of maritime law.

5. City Ordinances concerning vessels are binding only as police regulations: beyond this they have no force in the United States Courts. This court will allow them to be read, determining for itself their application to the subject matter.

On the 12th of July, 1854, the schooner Palmetto was lying at the claimant's dock, on the west side of the south branch of the Chicago river, with her head up stream. An anchor was suspended from her larboard bow, with its flukes some distance below the surface of the water. It was about six o'clock in the morning; the wind was blowing pretty fresh from the south-east. At that time, and while the Palmetto was in that position, the steam tug Seneca was proceeding down the south branch from Bridgeport, having in tow eight or nine canal boats, two abreast. Among these canal boats was the Rio Grande, in the third tier from the tug, loaded with oats—both boat and cargo the property of the libellant.

The Palmetto.

It was near a bend in the river, and just before they approached the Palmetto, the stern of the Rio Grande struck two mud scows which were lying near the dock, about two hundred feet above the schooner, which caused the bow of the Rio Grande to swing in towards the dock of the Palmetto. The speed of the Seneca was only two or three miles an hour, and it had been slackened as they were rounding the bend in the river. The river was quite full of vessels. With the wind as it was then, and for the Seneca, it was a heavy tow. The helmsman of the Rio Grande saw that he could not, with the helm, prevent the canal boat from coming in contact with the schooner, and an effort was made to keep her off with poles, which, as the mud was there soft, was unavailing, and a collision took place between the Rio Grande and the Palmetto forward, the anchor of the latter knocking a hole in the canal boat, which caused her to sink immediately.

Grant Goodrich, for libellant.

Mr. Hooper, for respondent.

DRUMMOND, J. The Palmetto was lying at her dock in the act of discharging her cargo. There can be no question of her right to be moored there for that purpose. While in that position, it was the imperative duty of all craft navigating the river to avoid coming in contact with her. This is a cardinal rule to be borne in mind in judging of the conduct of the Rio Grande. It is well known that the Chicago river is a narrow stream, requiring great caution on the part of vessels in passing up and down, and it is of primary importance that they should, as near as possible, keep the center of the river. Though there were several vessels at the time in the river, it does not appear that there were any immediately opposite the place where the Palmetto was moored which obstructed the channel. It was at a bend of the river. The tendency of the wind was to drive them toward the western shore. The circumstances and the place demanded unusual circumspection. The tug and its tow should have moved only at such speed as

to be under the command of the helm, or if that was impracticable, the speed should have been so checked as to avoid all danger in case of collision. The helmsman of the Rio Grande states that the canal boat struck some scows, which caused her to swing into the Palmetto. I can see nothing in the testimony to excuse or justify this contact with the scows. It is a fair inference that it was the cause of the collision, and it is a circumstance not to be overlooked, that he did not state this material fact till he had already undergone one separate examination. Independent of all this, I am of the opinion that, under the circumstances, the Seneca had too heavy a tow. The witnesses do not all agree about the wind, but the weight of the evidence is, there was a fresh breeze on the river. It is natural for tugs to include as many in tow as possible, but it should be remembered that the tow is almost exclusively under the control of the steamer, and if the latter is overtasked, it is an error which may be attended with the most serious consequences. In this instance the canal-boat was subject to the steamer, but the latter was the agent of the Rio Grande, and the principal must answer for the acts of the agent.

Besides, when a vessel navigating the river, comes in collision with another, properly moored at her wharf, the presumption is that the former is in fault, and that presumption must be overcome by satisfactory evidence. I see nothing in this case to rebut that presumption, but much to confirm and strengthen it. It would be a dangerous doctrine to hold a vessel entirely free from fault and its consequences, which by carelessness, negligence, or want of skill while navigating the river, comes in contact with another moored at the wharf, merely because there might be a fault on the part of the stationary vessel which would produce injury or tend to produce it.

It is said if the anchor of the Palmetto had not been where it was, no damage would have been done. It is difficult, perhaps, to decide absolutely what would have been the result if the anchor had not been there, but it may with equal truth be said,—conceding the proposition,—that if the Rio Grande had not come in contact with the Palmetto no injury would have

ensued. I feel inclined to judge the conduct of the Rio Grande with rather more strictness than I should if both vessels had been under way in the river. I consider that rule the safest which conduces most to vigilance, to the exercise of skill, to prudence and circumspection; and on the whole, my conclusion is, on this part of the case, that the Rio Grande was in fault.

The next point to be determined is, whether the Palmetto was in fault.

It has been strenuously urged on the part of the claimant, that the schooner was lawfully at her dock discharging her cargo, and that the collision and its consequences must legitimately fall upon the Rio Grande, by whose unskillful management the accident was caused.

An ordinance of the city has been introduced in evidence which requires a vessel while at the wharf to have her anchor on board, or hanging at the forefoot, and some witnesses were examined touching the precise locality of the forefoot. I do not consider it necessary to dwell upon this branch of the case. We generally allow the ordinances concerning vessels to be read, but determine their application to the subject matter. They are binding only as police regulations: beyond this they have no controlling force upon the courts of the United States, which are governed by the principles and rules of the admiralty law.[1] It is necessary to inquire therefore, irrespective of the ordinance, whether the anchor of the Palmetto was at the time in a proper place; and I hold clearly it was not. There is some conflict of testimony as to its actual position, but I think the weight of the evidence is, it was hanging at the hawse pipe. When a vessel is navigating the river, the anchor should be in a condition to be let go at a moment's notice, because the safety of the vessel itself, and of others, may depend upon the anchor being speedily dropped. Under such circumstances the anchor, like the helm, is one of the agents of safety. Along side the wharf the anchor is useless. There the vessel's mooring tackle is not fastened to the

[1] Steamboat New York *vs.* Rea, 18 Howard, 223.

bottom, as with the anchor, but to the wharf, and the same remark applies here as in the other part of the case. While the vessel in motion must use all needful skill and caution to avoid the vessel at rest, the latter should always have her hamper, as well aloft as below, as much as practicable out of the way of passing vessels. The yards and anchors, and other movable parts of the vessel should be arranged with that object in view. The enforcement of this rule is peculiarly necessary in so narrow a stream as the Chicago river.

I do not think it necessary to decide a question made in the testimony and in the argument, whether the anchor was technically under the forefoot, because I am of the opinion whether it was or not, that it was not at the time properly disposed of. A vessel while lying at the wharf must have her anchor out of the way of passing vessels; it is not, perhaps, indispensable that it should be always on board, but it is certain it must be where it cannot injure vessels navigating the river. There is no other safe rule. If an anchor suspended from the hawse pipe, with its stock even with the surface of the water, or just above or below it, meets the requirements of the ordinance, it certainly does not meet the demands of the maritime law.

Whether the collision would have sunk the Rio Grande if no anchor had been there, we do not absolutely know. The libellant's witnesses think not; however this may be, it is clear in such an event, the Rio Grande would not only have had to bear her own loss, but the parties would have been liable for any damage done to the Palmetto; and this I think is one test to determine whether under the circumstances, the Rio Grande was in fault.

In a stream so narrow as the Chicago river, it is manifest that collisions may occur between vessels at the wharf and those in motion, in spite of the utmost skill and care. It is therefore extremely hazardous for the vessel at rest to have her anchor hanging at her bow or elsewhere, as a weapon of offence to crush any passing vessel which by inevitable casualty may come in collision. Any practice, if any exists,

which tends to produce such disastrous results cannot be sanctioned by this court.

Taking the case therefore as made by the witnesses of the claimant, the anchor was suspended at the hawse pipe in such a manner as to be liable to injure any craft in motion. This was a fault on the part of the Palmetto; it was also a fault that they did not drop the anchor on the approach of the Rio Grande, of which they had ample notice.

If it clearly appeared the Rio Grande struck the schooner through inevitable accident, as by a sudden and unforeseen flaw of wind, or otherwise, all proper skill and caution being used, I should allow the libellant full indemnity; but as I find both parties in fault, I can only allow partial compensation.

The rule in admiralty, in such cases, is that the loss must be divided. The evidence shows that the oats were a total loss. The canal boat was raised, and repaired. The quantity of oats was six thousand five hundred and sixty-two bushels, which at the market price in Chicago, as proved, is $2,067.03. The repairs of the boat were $439.42. Ten dollars a day are allowed for forty-seven days detention, $470.00. The whole damage therefore, was $2,976.45, one-half of which is $1,488.22, for which last sum a decree will be rendered against the claimant and his surety. Each party will pay his own costs.

Where a ship is at anchor in a proper place, colliding vessel liable. Strout *vs.* Foster, 1 Howard, 89.

Even though there was no fault with either vessel. United States *vs.* The Mayor, 5 Missouri, 230.

The fault, under almost any circumstances is with moving vessel. The Granite State, 3 Wallace, 310.

See also, The Lochlibo, 1 English Law and Equity, 651; Culbertson *vs.* Shaw, 18 Howard, 584; The Julia M. Hallock, 1 Sprague, 539; The George, 2 William Robinson's Admiralty R., 386; The Massachusetts, 1 do., 386; The Victoria, 3 do., 49; The Girolamo, 3 Haggard's Admiralty R., 169,173; The Eolides, Id., 367; The B. S. Sheppard, *post p.* 221.

Presumption against moving boat, and ordinary care will not excuse her. Mills *vs.* Steamboat Holmes, 1 Bond, 352; The Bridgeport, 7 Blatchford, 361; The Helen R. Cooper, 7 Blatchford, 378; The Russia, 3 Benedict, 471; The Leo, 3 Benedict, 569.—[*Reporter.*

THE SANDY RIVER BANK, of Farmington, Maine, vs. THE MERCHANTS', &c., BANK, of Chicago.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY TERM, 1857.

1. AUTHORITY OF CASHIER.—The cashier of a bank, as such, has no authority in another state to settle an account, taking private notes and drafts, and giving a receipt in full. In order to bind the bank, his power must be in the nature of an appointment as agent.

2. His is a limited authority, and parties claiming a discharge otherwise than by payment must show his authority.

The Sandy River Bank, of Farmington, Maine, was established in 1853, with a capital of $50,000. Of this capital a controlling interest, amounting to $38,000, was taken by the owners and managers of the Merchants and Mechanics' Bank of Chicago, the remaining $12,000 being held by parties in Maine. At that time Stephen Bronson was cashier and general financial agent of the Merchants and Mechanics' Bank. Through his engineering, Thomas J. Jones, formerly in a banking house in Chicago, was sent to Farmington to become the cashier of the Sandy River Bank. He assumed his position with the secret understanding that his salary of $850, which was all the Sandy River Bank managers allowed him, was to be increased to $2,000 per annum, the difference to be charged to the Merchants and Mechanics' Bank as "money of Jones."

With this secret understanding Jones so managed the affairs of the Sandy River Bank, that the Merchants and Mechanics' Bank of Chicago, had at all times, during the Bronson Administration, from $10,000 to $40,000 of the funds of the Sandy River Bank, over and above what appeared upon the books of the latter.

In July 1855, the sum of $22,000 stood charged against the Sandy River Bank on the books of the Merchants and Mechanics' Bank, and Mr. Woodworth, president of the former bank,

with Mr. Bronson, the cashier, had an interview in New York City with cashier Jones, at which a settlement was arrived at, by Jones giving a receipt in full and taking $12,000 of Bronson's private paper and $10,000 in cash.

Of this so-called cash payment, a large part consisted of Bronson's private drafts endorsed officially by Jones as cashier of the Sandy River Bank. These drafts were protested and suits brought by the holders against the Sandy River Bank on its endorsements. The bank being compelled to pay them, brought this action to recover for a balance due on account. The defendant pleaded the above settlement and the receipt then given. The plaintiff insisted that Jones had, as cashier, no authority to make such a settlement or to receive these drafts as cash.

George Evans, for plaintiff.

Corydon Beckwith, for defendant.

DRUMMOND, J., charged the jury as follows:

Mr. Bronson, as the cashier of the Merchants and Mechanics' Bank, had no right, because he was cashier merely, to make the contract he made with Mr. Jones of the 28th of September, 1853, so as to bind the bank; there must have been an express authority from the bank or one resulting from necessary implication. And in order to be binding on the bank at all, it would have to be in the nature of the appointment of an agent, and not an appointment to the cashiership of a bank in another state.

A bank, undoubtedly, may appoint agents in another state to perform any act which it could perform itself, and which is not prohibited by law.

If the items in the account which it is alleged are charged to the defendant, as salary of Mr. Jones, have been admitted or allowed by the bank as a bank, for services performed, then the jury may charge the defendant with them, or if, with a full knowledge of all the facts attending its payment, the bank has admitted or allowed it, in the nature of compensation for

services performed, and not as salary merely, then the defendant was bound by it, but not otherwise.

The cashier of a bank is ordinarily the executive officer of the bank. He is the agent through whom third persons transact their business with the bank. The bank generally holds him out to the world as having authority to act, according to the general usage, practice, and course of business, and all acts done by him within the scope of such usage, practice, and course of business, bind the bank as to third persons who transact business with him on the faith of his official character; and perhaps it may be presumed, without proof and merely from his office, that he is authorized to receipt and discharge debts and deliver up securities on payment or discharge of the debt for which they were held, and he may have power to endorse bills, notes, &c., for collection. He may draw checks for funds in other banks. Possibly these powers might be inferred from his official position. But still his authority is *a limited authority*, and when a party claims a discharge from a debt due the bank, not by payment, but by giving other or different notes, bills, or securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof.

As a general rule, a jury have not a right to infer that a cashier of a bank, as such, has the authority to compromise and discharge debts without payment, or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must exist and be established by the particular usage, or practice, or mode of doing business of the bank, or it must be ratified or acquiesced in by the bank in order to be binding.

Verdict for plaintiff.

The cashier cannot bind the bank except within the scope of his authority, Foster *vs.* Essex Bank, 17 Massachusetts, 479. Has no authority to transfer judgments or dispose of its property. The president and directors are the only persons who can legally make such transfer. If the cashier acts as their agent, his authority must be shown, Holt *vs.* Bacon, 25 Mississippi, 567.

Acts of a cashier are only binding upon the bank when he acts within the

sphere of his agency. The State *vs.* Commercial Bank, 6 Smedes & Marshall, 218; United States *vs.* City Bank of Columbus, 21 Howard, 356.

"Ordinary duties" does not comprehend making contracts involving the payment of money, unless it be such as has been loaned in the customary way, without express power from board of directors. Nor to purchase or sell the property of or create an agency for the bank. Ibid.

Consult also Hallowell & Augusta Bank *vs.* Hamlin, 14 Massachusetts, 180; Hartford Bank *vs*, Barry, 17 Id., 94; Wild *vs.* Bank of Passamaquoddy, 3 Mason, 505; Ridgway *vs.* Farmer's Bank of Bucks county, 12 Sergeant & Rawle, 265; Stamford Bank *vs.* Benedict, 15 Connecticut, 445; Ryan *vs.* Dunlap, 17 Illinois, 40; Fleckner *vs.* Bank of United States, 8 Wheaton, 338; Bridenbecker *vs.* Sewell, 32 Barbour, 9; Bank of State of New York *vs.* Farmers' Branch, &c., of Ohio, 36 Barbour, 332; Bank of Pennsylvania *vs.* Reed, 1 Watts & Sergeant, 101; Payne *vs.* Commercial Bank of Massachusetts, 6 Smedes & Marshall, 24; Minor *vs.* Mechanics' Bank of Alexandria, 1 Peters 46.—[*Reporter.*

BARRON vs. NEWBERRY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL TERM, 1857.

IN EQUITY.

1. DECREE OF FORECLOSURE AGAINST BANKRUPT DOES NOT EXTINGUISH EQUITY OF REDEMPTION.—A decree of foreclosure against a man who had been duly adjudicated a bankrupt, his assignee not having been made a party, is insufficient to extinguish the equity of redemption.

2 ASSIGNEE MUST BE MADE PARTY.—A bankrupt from the time of rendition of the decree in bankruptcy, is *civiliter mortuus*, so far as his property is concerned, and the equity of redemption having passed out of him into his assignee, neither the bankrupt nor any court other than the court in bankruptcy can by proceedings to which the assignee is not a party affect his title to the property.

3. The mortgagee cannot plead a want of notice, all parties in the absence of fraud being chargeable with notice of proceedings in bankruptcy.

4. The property having been sold by the assignee, under order of the court, the purchaser is entitled to redeem.

5. Title by possession and payment of taxes under state law will not prevent such redemption.

This was a bill to redeem, filed by the plaintiff as owner of the equity of redemption in the premises described in the bill,

situated in Cook County, Illinois, by purchase from Gordon Burnham, who claimed title thereto by deed from W. C. H. Waddell, the assignee in bankruptcy, for the southern district of New York.

William L. Haskins, on the 11th day of July, 1836, purchased the premises in question of the defendant, Walter L. Newberry, and received a warranty deed of the same, vesting a title in him in fee simple, which was recorded in Cook county, on the 1st day of September, 1836.

At the same time with the execution of said deed, Haskins executed a mortgage of the premises back to Newberry, to secure the payment of the sum of $12,000.00, the unpaid part of the purchase money, with interest at seven per cent., which was also recorded in said county, August 31st, 1836.

On the 4th day of March, 1843, Haskins was by a decree in the district court of the United States, for the southern district of New York, declared a bankrupt; and W. C. H. Waddell was by order of said court made his assignee.

Haskins in his schedule of property attached to his petition, had the following entry:

"One undivided half of forty acres of land in Chicago, Illinois, for which $4,000.00 principal and $420.00 interest have been paid by petitioner subject to mortgage to Walter L. Newberry for $12,000.00, part of the purchase money."

After proper proceedings had upon the motion of Waddell, the assignee, a sale was ordered of the property, by the district court, and on the 15th day of July, 1845, it was sold at public sale to Gordon Burnham, for the sum of $5,00. On the 22nd day of October, 1845, a deed in due form was executed by Waddell, the assignee, to Burnham; but upon the petition of the assignee, the court made an order for another deed amending the description of the property. which order was executed by the assignee by deed, bearing date October 27th, 1855. On the 29th day of October, 1855, Gordon Burnham, in consideration of $2,000.00, conveyed the same premises to the complainant, William Barron.

On the 1st day of March, 1848, long subsequent to the

bankruptcy of Haskins, Walter L. Newberry filed a bill in the court of common pleas for Cook county, Illinois, to foreclose his mortgage upon said property.

To this bill the only parties defendant were Haskins the bankrupt, and one Marcus Wilbur, and jurisdiction was sought to be obtained by publication under the statute of the State of Illinois.

A decree was entered in this suit by default at the May term of the court, 1848, and the premises sold July 27th, 1848, to the present defendant, Walter L. Newberry, who received a master's deed on the 5th of July, 1851, and he now claims to hold the title by virtue of this deed, made to him as purchaser under the decree. Under this state of facts the complainant, William Barron, on the 8th of March, 1856, filed his bill in this court to redeem the premises from the mortgage of Newberry, and set forth therein the title of Haskins, his bankruptcy, the transfer by operation of law of the equity of redemption in the mortgaged premises to Waddell, the assignee, and a conveyance by Waddell, the assignee, to him. He also set forth a tender and offer to pay the amount due on the mortgage, and prayed leave to redeem and for an account, and reference to ascertain the amount due, and that Newberry be decreed to release by deed the said premises to him.

The answer admitted the title of Haskins and the bankruptcy, but denied that the equity of redemption was thereby conveyed to the assignee as against Newberry. It claimed that Newberry had no notice of the bankruptcy, or the title of the assignee, or of the deed of Burnham, and no such title appeared on record in the registry of deeds in Cook county, and nothing to show that Haskins was not the real owner, or held the title in trust for other parties who paid the purchase money.

It was admitted that the title of record was vested in Haskins at the time of his bankruptcy, and no adverse interest had ever appeared on record, or been set up or established by any proceedings at law or in equity against Haskins' title. The answer further alleged fraud in obtaining the sale and deed by Burnham, but no evidence was offered to substantiate this charge.

Title was also claimed by payment of taxes for seven years, &c., under the statute of the state.

C. Beckwith, for complainant.

1. It is a well settled rule that the mortgagee can not divest the equity of redemption without a proceeding to which the party legally entitled to such equity is made a party defendant; and if the mortgagor's interest has been transferred before the suit in such a way that the mortgagee was bound to know the fact, as by descent, or by operation of law, or by deed of record, or brought home to mortgagee's knowledge, a decree and sale under such foreclosure will not affect the right of redemption unless the person owning such right be made a party.

Glidden vs. Doe ex dem. Andrews, 10 Alabama, 166; *Doe ex dem. Chaudron vs. Magee*, 8 Id., 570; *Fenwick vs. Macey's Executors*, 1 Dana, 276; *Holt vs. Alloway*, 2 Blackford, 111, note; *Evans vs. Instine*, 6 Ohio, 117; *Miami Express Company vs. Brown*, Id., 535; *Gordon vs. Hobart*, 2 Sumner, 401.

In 20 Wendell, 260, *Watson vs. Spence*, COWEN J,. in giving the opinion of the court, says:

Where the equity has been assigned under such circumstances that the mortgagor is bound to know of it, the sale will not pass the rights of the assignee, unless he be made a party.

Shackleford vs. Stockton, 6 B. Monroe, 390; *Glidden vs. Doe ex dem. Andrews*, 10 Alabama, 166.

"The bankrupt, from the time his petition is filed, is *civiliter mortuus* as to all suits at law or equity pending in which he is a party, and consequently after that time no judgment could be recovered against him. The court will inquire whether in fact the judgment was not entered after the petition was filed, and if so will treat the judgment as of no more validity than if entered against a deceased person."

Ex parte Foster, 2 Story, 131; *McLean vs. Rockey, et al*, 3 McLean, 235.

Subsequent incumbrancers should be made parties. *Sherman vs. Cox*, 2 Freeman, 14; Story's Equity, §193; Coote on Mortgages, 504; *Draper vs. Earl of Clarendon*, 2 Vernon, 518; *Godfrey vs. Chadwell*, 2 Vernon, 601; *Morret vs. Westerne*, 2 Vernon, 663; *Hobart vs. Abbot*, 2 Peere Williams, 643.

In *Adams vs. Paynter*, 1 Collyer, 532, V. C. Bruce, says: "Ever since I have known anything of this court, such intervening incumbrancers have always been considered necessary parties to a bill of foreclosure. I should act against universally recognized and established rules if I were to suggest a doubt upon the subject." The rule thus established in England has been universally recognized in this country, although some judges have doubted its propriety. *Haines vs. Beach*, 3 Johnson's Chancery, 459; *Cooper vs. Martin*, 1 Dana, 23; 4 Kent, 185.

The assignee in bankruptcy is a necessary party to a bill to foreclose a mortgage. *Lowry vs. Morrison*, 11 Paige's Chancery R., 327; *Coe vs. Whitbeck*, Id., 42; *McLean vs. The La Fayette Bank*, 3 McLean, 191; *Thorne vs Deas*, 4 Johnson, 84; *Sedgwick vs. Cleveland*, 7 Paige's Chancery R., 287; *Anonymous*, 10 Paige, 20; Story's Equity Pleadings, §§158, 349, note; 1 Daniell's Chancery Practice, 255.

Lloyd vs. Lander, 5 Maddock, 175, demurrer on joinder of bankrupts, allowed. *Fellows vs. Hall*, 3 McLean, 487.

It has also been held that unless an assignee in bankruptcy is made a party to a suit after a decree in bankruptcy, a decree of foreclosure will be a nullity as to him, and will not foreclose the equity of redemption in the premises.

Johnson vs. Fitzhugh, 3 Barbour's, Chancery R., 360; *Fellows vs. Hall*, 3 McLean, 487; *Lowry vs. Morrison et al.*, 11 Paige, 327; *Coe vs. Whitbeck*, 11 Paige, 42; *N. C. McLean, Assignee, vs. The Lafayette Bank, et al.*, 3 McLean, 185; *Carr vs. Gale*, 3 Woodbury and Minot, 38; *McLean, Assignee, vs. Rockey et al.*, 3 McLean, 235; *Ex parte Foster*, 2 Story, 131.

Where jurisdiction is conferred under a special statute by constructive notice, unless such statute is strictly pursued, the

judgment will be void. *Lawlins vs. Lackey*, 6 T. B. Monroe, 70; *Butler vs. Cooper*, 6 J. J. Marshall, 29; *Green vs. McKinney*, Id. 193; *Green vs. Breckenridge*, 4 T. B. Monroe, 541; *Bond vs. Hendricks*, 1 A. K. Marshall, 440.

The above are all cases under publication notices.

Webster vs. Reid, 11 Howard, 437, and cases cited in brief of counsel for plaintiff.

"In every form in which the question has arisen, it has been held that a statute authority by which a man may be deprived of his estate must be strictly pursued." *Bloom vs. Burdick*, 1 Hill, 141; *Jackson vs. Esty*, 7 Wendell, 148; *Atkins vs. Kinnan*, 20 Wendell, 240; *Harris vs. Hardeman*, 14 Howard, 334; *Mankin vs. Chandler*, 2 Brockenbrough, 125; *Kelso vs. Blackburn*, 3 Leigh, 323.

The assignee of bankrupt has a right to redeem. *Lloyd vs. Lander*, 5 Maddock, 175; *Spragg vs. Binkes*, 5 Vesey, Jr., 587; *Hitchcock vs. Sedgwick*, 2 Vernon, 161; *Pillow vs. Langtree*, 5 Humphreys, 389.

No lapse of time, (without permission) and with it none short of twenty years, will bar the right to redeem. *Dexter vs. Arnold*, 1 Sumner, 109, cited and approved in 16 Howard, 579; S. C., 3 Sumner, 152; 2 Story's Equity, 1028; *Hughes vs. Edwards*, 9 Wheaton, 489; Angell on Limitations, § 456.

If the mortgagor continues in possession, no length of time will bar the equity. Angell on Limitations, §462; 1 Powell on Mortgages, §§360–392, and notes.

Williams & Goodrich, for defendants.

The assignee must protect his rights by record or possession, like all other purchasers.

He can procure an order for a deed from the bankrupt, which can be recorded, or he can record a certified copy of the decree.

Such is the law in England.

Eden on Bankruptcy, 225–267–268; 2 Powell on Mortgages, 591, note v; 3 Powell, 1085; 2 Sugden on Vendors, 512. Story's Equity, §1035, and note.

Under our laws the conveyance was not perfected as to credit-

ors without notice, until recorded. *Doyle vs. Teas*, 4 Scammon, 202; *Martin vs. Dryden*, 1 Gilman, 187; *Doe ex dem. Sturges vs. The Bank of Cleveland*, 3 McLean, 140; *Choteau vs. Jones*, 11 Illinois, 300.

The bankrupt had no interest to vest in his assignee; the mortgage was quadruple the value of the land,—therefore the bankrupt had nothing to pass to his assignee, nothing beneficial, to say the least. *The Ontario Bank vs. Mumford*, 2 Barbour's Chancery R., 596; Eden on Bankruptcy, 306; *Camack vs. Bisquay*, 18 Alabama, 286; *Dwinel vs. Perley*, 32 Maine, 197; *Baker vs. Vining*, 30 Maine, 121; *Mitchell vs. Winslow*, 2 Story 637 and 8, where it is said the assignee only takes the interest of the bankrupt, and that a possibility cannot be assigned. See also *ex parte Newhall*, 2 Story, 360.

The assignee abandoned his interest in the land,—this he may do. *Bundillon vs. Dalton*, 1 Espinasse, 233; *Smith vs. Gordon*, 6 Law Reporter, 313.

To the same point are *Paulding vs. Lee*, 20 Alabama, 753; *Rugely vs. Robinson*, 19 Alabama, 404. Similar in principle, *Choteau vs. Jones*, 11 Illinois, 323; *McGoon vs. Ankeny*, 11 Illinois, 558; *Fiske vs. Hunt*, 2 Story, 582; *Ex parte Christy*, 3 Howard, 292; *Packard vs. The Sloop Louisa*, 2 Woodbury & Minot, 49; *Bentlinger vs. Hutchinson*, 1 Watts, 46; Dart on Vendors, 46; 1 Powell on Mortgages, 181, Note L.; *McKnight vs. Taylor*, 1 Howard, 161; *Bowman vs. Wathen*, Id. 189; *Piatt vs. Vattier*, 9 Peters, 416; *Follansbe vs. Kilbreth*, 17 Illinois, 522; 2 Sugden on Vendors, 515, note.

McLean, J.—Many points have been raised and most elaborately discussed by the various counsel who have filed briefs in this cause, but in the view taken by the court the decision of one or two points is conclusive upon the rights of the parties, and it will not, therefore, be necessary to intimate an opinion upon such other points as in the judgment of the court are not necessarily involved in settling the rights of the parties. Neither is it the intention of the court at this time to discuss at length the points about to be decided, but merely to indicate the opinion to which we have come, as briefly as possible.

had the power to dispose of this property does not give him the power always to do so. His power of disposition ceased with the decree of bankruptcy, and the decree of the Cook County Court of Common Pleas could not re-invest him with the title so as to pass it to the purchaser under that decree. The decree then was powerless so far as Haskins was concerned in regard to the property, and we are at a loss to understand how under these circumstances this decree of foreclosure could possibly affect the rights of third parties, strangers to the record. It is a familiar and well settled principle that no judgment can operate as a bar or foreclosure, excepting between the parties to the judgment and those who claim subsequently to them. As to all other parties it is *res inter alios acta.*

Applying this principle to the present case, it will be seen that the rights of Waddell, the assignee, and his grantees, Burnham and the complainant herein, were not affected in any degree by the suit instituted by Newberry against Haskins, to foreclose his mortgage. They were not parties to the suit, and their rights could not be determined thereby. As to them it was *res inter alios acta.*

The decision of these points settles this controversy, and it is not therefore necessary to indicate any opinion upon the other points discussed by counsel. The complainant being the owner of the equity of redemption unextinguished has the right to redeem the property, unless there are circumstances in the case which estop him from asserting his right. The court has been unable to see any thing in the conduct of the complainant or his grantors which would lead to such a result. Lapse of time, such as appears here, is not sufficient to estop the assertion of their right to redeem. The defendant has sold his land at his own price, and he will in the redemption receive his purchase money and interest. If he had taken steps to make the proper parties to his suit against Haskins, the result might have been the same, and he might have obtained his decree and sale in due legal form, but this can only be conjecture. The court cannot look at what might have been, but at the facts as they actually are, and in so looking at these facts we feel com-

pelled to grant the prayer of the complainant to redeem. All parties are chargeable with notice of the proceedings in bankruptcy, in the absence of fraud, and hence the defendant cannot claim a want of notice. Neither do we consider the claim of title under the seven-year law of the state as affording any defense under the facts as proved. An order may be entered in proper legal form to this effect, and appointing a master to state an account, &c., as prayed by the complainant in his bill.

DRUMMOND, J., concurring.

By comparing the 14th section of the Bankrupt Act, of 1867, with this section of the act of 1841, it will be seen that the rights, powers, and duties of the assignee are essentially the same under both acts, and it is believed that the principle of this decision applies equally to the present Bankrupt Act.

That an assignee appointed *pendente lite* is not a necessary party. See Cleveland *vs.* Boevum, 7 American Law Register, (O. S.,) p. 144.

The purchaser, under a deed from the assignee of a bankrupt, can hold the title against a prior unrecorded deed from the bankrupt. Holbrook *vs.* Dickenson, 56 Illinois, 497. [*Reporter.*

THE PILOT.

CIRCUIT COURT.—DISTRICT OF MICHIGAN.—JUNE TERM, 1857.

RULES OF NAVIGATION.

1. EXCEPTIONS.—There are exceptions to the general rules of navigation, for which no regulations can be provided.

Under such circumstances each vessel should be managed with care and skill, to avoid a collision, and if there be a failure to do this, though a vessel be within the rule, she can claim no damages for injuries received.

A strict adherence to the rule, which necessarily leads to a collision, affords no excuse to a vessel.

2. STEAMER MEETING SAIL VESSEL.—A steamer is required to give way to a sail vessel; yet, if she cannot do so without peril, the sail vessel must avoid her. It is no objection to the jurisdiction, that the sail vessel was less than twenty tons burden, nor that the collision was near the Canada shore.

3. ANSWER—WHEN SUFFICIENT.—An answer which sets up facts constituting negligence is sufficient, though no fault be formally charged. The rules of pleading in admiralty are less technical than at law.

4. WHEN SAILING VESSEL SHOULD CHANGE HER COURSE.—The master of

a steamer has a right to expect that an approaching sail vessel will change her course if she can do so without risk, and any other course will involve danger of collision.

No sail vessel which recklessly attempts to cross the line of a steamer when there is no necessity for doing so, and when the steamer could not give way without encountering peril, can be entitled to recover for an injury received.

Appeal from District Court.

The facts are stated in the opinion.

Mr. Newberry, for libellant.

Mr Duffield, for respondent.

McLEAN, J.—The schooner Pilot, being on a voyage down the lakes from Ellen Creek, on Lake Huron, to Kingsburgh, on Lake Erie, on the 10th of June, 1856, at about half-past eleven in the forenoon, the wind blowing from the south-east, was beating down the Detroit river, and while steering from the American to the Canada side of the river, a little below Bois Blanc Island, the steamboat Pearl ran into the Pilot, cut through her hull, shear, bulwarks, decks and rigging, and destroyed her cargo in part, and caused her to fill with water so as to be damaged.

It is alleged in the libel that at the time of the collision, it was broad daylight; that the schooner kept her course, as she was bound to do, and that the collision occurred near the Canada bank, there being sufficient space for the Pearl to have passed the schooner, as the channel there is nearly half a mile wide, but she made no effort to avoid the schooner.

The answer states that the Pearl, being on a trip up the Detroit river to Detroit, when near to Malden saw the schooner beating down the river and heading towards the Canada shore, nearly abreast of the buoy, which was upon the shoal off fort Malden; that the brig America, at the same time, occupied the center of the channel nearly abreast of the schooner, holding up the river, and when the schooner was about five hundred feet from the Pearl, her helm was ported and engine checked, and immediately afterwards her

helm was put hard a-port, and her engine stopped; that the Pilot at that time was close upon the channel bank, so that it was supposed she would heave in stays, to avoid running on the shore: that the master of the Pearl intended to run inside of the Pilot, steering close to the channel bank; that he adopted that course because the Pearl was long, sharp, and difficult to steer, and if he had attempted to pass the right side of the Pilot, and it had gone about, a collision between the Pearl and the Pilot, or the brig would have been unavoidable.

The channel at the place of collision is between one-half and a quarter of a mile wide. The master of the Pilot says the brig was in about the middle of the river, sailing up the stream; there might have been, he says, fifteen or twenty rods between us. Had the Pearl put her helm a-starboard, a few minutes before the collision, he says, she would have passed our stern.

John Cary, master of the brig, says: "About mid-day when I was abreast of Fort Malden, I saw a small vessel beating down to the leeward of me; she was by the wind, with her starboard tacks aboard. At that time my vessel was about one-half the way across the channel from the fort. I was not certain from the position of the two vessels, that I should go clear of her. I called to her and asked her to go about. Some kind of an answer was made to me, which I did not understand. He did not go about. He stood along and just cleared our jib-boom. I think the vessel was the Pilot. After passing our bow she came up partly in the wind, and I supposed she intended to go about, but then he up helm again, and kept her off with a good full on her and sweeping down the current, the steamer Pearl ran foul of her, striking her near her main rigging. At the time of the collision, the Pearl was backing her engine. The two vessels were more than the Pearl's length apart, when the Pearl stopped her engine. Except the backing, he observed no effort of the Pearl to keep out of the way. Prior to the collision, my vessel was between the Pearl and schooner, so that the schooner could not have been seen from the Pearl.

The collision occurred in slack water, close to the channel bank. The Pearl was running so close to the bank that she

could go no further to the right. The Pilot, I think, was right on the channel bank, near the buoy, at the time of the collision. The Pearl could not have changed her course to the right, and had she passed to the left, when the schooner first came round my bow, by starboarding her helm, it was an even chance to avoid a collision either way. I saw it was a pretty bad smash-up."

The damages in this case are but of small amount, but the decision, it appears to me, involves an important principle. It is whether the facts of the case do not constitute an exception to the general rule of navigation, as laid down by the Supreme Court. After much reflection I have come to the conclusion, that under the circumstances, the steamer was not in fault in keeping her course.

To all general rules there are exceptions, arising from the nature of the case, and to which a general regulation can have no application. In such a case each master or officer in command is bound to act under the exigencies, with that skillful seamanship which the officers of each vessel are supposed to possess, and especially the masters.

In the case of *St. John vs. Paine et al.*, 10 Howard, 557, the court says, of sailing vessels, "A vessel that has the wind free, or sailing before or with the wind, must get out of the way of a vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences." And, further, "steam vessels are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do, under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision, not belonging to sailing vessels, even with a free wind, the master having the steamer under his command, both by altering the helm and stopping the engines. * * * As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to

keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her."

But in the same case, the court says, "These rules have their exceptions in extreme cases, depending upon the special circumstances of the case; and in respect to which no general rule can be laid down or applied. Either vessel may find herself in a position at the time, when it would be impossible to conform to them, without certain peril to herself or a collision with the approaching vessel. Under such circumstances the master must necessarily be thrown upon the resources of his own judgment and skill, in extricating his own vessel as well as the vessel approaching, from the impending peril. These cases cannot be anticipated, and therefore cannot be provided for by any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise."

In the case of the *Hope*, 1 W. Robinson, 154, it was argued, that if it was in the power of one of the vessels which came into collision to have avoided the collision by giving way, she was bound to have done so, notwithstanding the rule of navigation. This the court admitted to be true, as a general proposition; and that no vessel should unnecessarily incur the probability of a collision, by a pertinacious adherence to the strict rule of navigation.

In the case of *The Lady Anne*, 15 Jurist (English), 18, in answer to Dr. Lushington's questions, the Trinity Masters said, "We admit that the general rule is, that where two vessels are close-hauled, the one on the larboard tack is to give way, and the one on the starboard tack to keep her luff; this rule does not excuse the vessel on the starboard tack not taking other measures to prevent the collision, if circumstances render it necessary. In this case, we think the *Lady Anne* should have put her helm down, and have eased off the head sheets. These measures she did not adopt. Had this been done, we think the collision might have been avoided; therefore the *Lady Anne* is to blame." Dr. Lushington adopted the view of the Trinity Masters, and pronounced for the damage and costs.

"The law recognizes no inflexible rule, the neglect of which by one party will dispense with the exercise of ordinary care or caution in the other. A man is not at liberty to cast himself upon an obstruction, which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to be in the right." "Two things must concur to support an action for a collision. It must be a collision by the act of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff." *Sills vs. Brown*, 9 Carrington & Payne, 601.

On the above principle I assume the ground, that the Pilot did not exercise that caution and skill which were necessary to enable her to recover damages in the case. In the answer, the Pearl does not charge the Pilot with fault in form, but the facts are stated, from which the court cannot but see it did not avoid the collision when it might and should have done so. The rules of pleading in admiralty are less technical than at law.

The Pearl was ascending the river on the Canada side, close to its channel bank. On the approach of the Pilot, at an angle, perhaps, of about forty-five degrees, crossing the bow of the Pearl, its helm was ported, throwing its starboard wheel on the mud of the channel bank. She stopped her engine, and reversed its action. She could do no more than this with safety.

It is said she might have thrown her helm a-starboard, and passed the stern of the Pilot. This would, in all probability, have caused a collision with the Pilot or the brig, which was only a few hundred feet from the Pearl. The Pilot was heading from the American, towards the Canada shore; she was close-hauled to the wind, and, it is said, could not alter her course. The wind was light. She was beating down the river, and could, in that mode, make progress only by an angular course from one shore of the river to the other. This is admitted; but she could tack or heave in stays in any part of the river with as much ease and more certainty than when near to either shore. She might have drifted out of the river,

by throwing her broadside to the current, or by using sufficient sail to keep her head to the current, so as to be carried by it stern first. When the wind is across the current, in tacking, there is great danger of missing stays on the lee shore.

Could the master of the Pearl, under the circumstances, suppose that the Pilot would continue her course across the river until she struck the Canada shore? Her destined port was a long distance below Malden, and she had no occasion to land at that place. Such a supposition could only have been founded on the ignorance or perverseness of the master of the Pilot. On the contrary, the master of the Pearl did expect, and had a right to expect, under the circumstances, that the Pilot would turn about, as she might do without risk, before she approached the shore or came in collision with the Pearl.

The master of the brig is a disinterested and an intelligent witness. A want of skill in the master of the Pilot is shown, by crossing the bow of the brig so slowly as to touch her jib-boom. The master of the brig called on the Pilot to turn about, but he continued his course regardless of consequences. He only escaped a collision with the Brig by a few feet. And seeing the position of the Pearl on the shore channel of the Canada side, the master of the brig said, to use his own words, he saw there "would be a pretty bad smash-up." So near was the Pilot to the Pearl, directly after she passed the bow of the brig, that the collision in a few minutes occurred. The master of the Pearl did what he could to avoid a collision, except that of starboarding his helm, which would, in all probability, have brought his vessel in collision with the brig, and certainly with the Pilot, had she gone about, as every competent and prudent seaman would have done.

Had there been no vessel to the larboard side of the Pearl, which would have been endangered by putting her helm hard a-starboard, she should have done so, and passed the stern of the Pilot; but no master of a vessel, however small it may be, can be presumed to be so ignorant or reckless as to run into danger when he could avoid it. No sail vessel which recklessly attempts to cross the bow of a steamer, when there was

no necessity for doing so, and when the steamer could not give way without encountering peril, can be entitled to recover damages for an injury so received.

In the *Santa Claus*, Olcott, 428, it was said by the court, that the question of culpable negligence is not determinable absolutely by any rule of navigation; that these rules are not inflexible, and a vessel which adheres to them in form may still be at the same time guilty of a tortious injury to another which fails to observe them. It is eminently proper that a strict observance of any of these regulations should be avoided, when there is a plain risk in adhering to them, and it is entirely in the power of either vessel to escape a collision by departing from the methods provided by the rules. In the case of *The Friend*,[1] Dr. Lushington discusses the effect of extraordinary contingencies, and holds that they must afford exceptions to the standing rule, however positive its terms may be; and in that case admitted a vessel, though out of the required course, to recover damages sustained from a collision in that situation.

The vessel claiming damages must show that she did not contribute to the collision. Admitting that the other vessel is not within the rule of navigation, she must be avoided if it can be done by the exercise of a reasonable caution and skill. To run on a vessel, because she is not within the rule, taking no care to avoid her, though the colliding vessel be within the rule, is culpable. The rules of navigation are addressed, not only to intelligent persons, but to persons supposed to be skilled in seamanship; and they are to be observed in such manner as not, willingly or negligently, to inflict an injury, under the pretense of observing the rule.

It was objected to the jurisdiction in this case, that the Pilot is a vessel under twenty tons burden as provided in the act of 1845.[2] That was a special act to authorize the "jurisdiction of the district courts in matters of tort and contract, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, * * * on the lakes and navigable waters

[1] 1 W. Robinson, 478.

[2] 5 United States Statutes at Large, 726.

connecting said lakes, &c." But the admiralty jurisdiction now exercised between two or more states, over navigable waters, is not derived from the act of 1845, but from the Constitution and the Act of 1789,[1] under which act the maritime jurisdiction extends to vessels of ten tons and upwards.

It was also objected that the wrong complained of took place on the Canada shore, and without the jurisdiction of the United States. By our treaty with England, of 1842, it is specially provided, that the channels in the river Detroit on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties.

For the reasons above stated, the decree in the above case is reversed, at the costs of the libellant.

See The Delaware, *ante* p 110. The Empire State, in subsequent volume of these Reports and cases there referred to.

If the collision is occasioned by an alteration of the course of the sailing vessel, it devolves upon her to prove the necessity or propriety of such movement. If by changing her course without necessity to cross the bow of a steamer, so near to the latter, that stopping and backing the engine did not avoid a collision, she cannot support an action for the damages thereby occasioned. The Steam Tug William Young, Olcott, 38.

Where a vessel is tacking in a river or narrow channel, a vessel approaching her under the pressure of an obligation to avoid her, has, in general, the right to assume that she will beat out her tack; but this presumption must yield to peculiar exigencies. The Vicksburg, 7 Blatchford, 216.

A vessel has a right to assume that other vessels will act in obedience to statute regulations. The Ariadne, 7 Blatchford, 211. And will beat out their tack, The Vicksburg, Id., 216.

As to duty of sailing vessel to beat out her tack, see The Steamboat Empire State, 1 Benedict, 57.

As to right so to do, The Sloop Argus, Olcott, 304.

Where a steamer and sailing vessel are approaching each other on courses that may lead to a collision, the steamer cannot be excused for holding her way upon the hypothesis and belief, that the sailing vessel cannot with safety to herself keep her tack, but must go about or come into the wind before they meet. The Washington Irving, 1 Abbott's Admiralty R., 336.

[1] 1 United States Statutes at Large, 76, 7.

A sailing vessel has, however, no right to persist in her course in such a manner as to make a collision probable, or to drive the steamboat into danger or exposure in order to avoid her. The Cornelius C. Vanderbilt, 1 do., 361.

Nor is she entitled to impose upon the steamer the duty to guarantee her against a collision. The New Champion, 1 do., 202.—[*Reporter.*

PITTS *vs.* EDMONDS.

CIRCUIT COURT.—EASTERN DISTRICT OF MICHIGAN.—JUNE TERM, 1857.

IN EQUITY.

At law, a notice is essential to authorize the defense of want of novelty. In chancery the rules of pleading equally require the same matter to be set up.

The most valuable inventions consist in the combination of known mechanical powers. Every part of such inventions may be found in some form, among the various devices of human ingenuity, and the man who unites these powers, and produces a new and important result to society, is well denominated a public benefactor.

It is not the man who may form an imperfect machine, which may suggest to a higher order of mind, valuable ideas, but it is the one who embodies those ideas in a practical and working form whom the law protects.

A patent, in calling for a specific mode, embraces in law all mechanical equivalents, or modes which operate on the same principle, consequently all modes, however changed in form, but which act substantially on the same principle, and effect the same end, are within the patent. If this were not so, a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill.

This was a bill in equity, filed to restrain the infringement of letters patent granted to William Woodworth, December 27, 1828, for improvements in planing and tonguing and grooving machines, more particularly referred to in the case of *Foss vs. Herbert*, *ante* p. 121.

The facts sufficiently appear in the opinion of the court.

S. A. & D. Goodwin, Jr., for complainant.

S. S. Fisher, of counsel for complainant, filed the following brief:

1. The complainant shows a *prima facie* case of exclusive right, exemplification of the letters patent, and the defendant's stipulation as to title. Act of 1836, §4, 5 Statutes at Large, 117; Curtis on Patents, §§30, 39; *Alden vs. Dwey*, 1 Story, 336, 2 Robb, 17; *Woodworth vs. Sherman*, 3 Story, 171; 2 Robb, 257; *Stearns vs. Barrett*, 1 Mason, 153; 2 Robb. 297; *Winter vs. Wells*, Webster's Patent Cases, 129; 2 Greenleaf on Evidence, §473.

As to what is an infringement, *vide* Curtis on Patents, §§ 220–1–2, and cases cited. *Walton vs. Potter*, Webster's Patent Cases, 586, note; *Wyith vs. Stone*, 1 Story, 273; 2 Robb, 23; *Odiorne vs. Winkley*, 2 Gallison, 51; 1 Robb, 52; *Buck vs. Hermance*, 1 Blatchford, 398; Curtis on Patents, §224; 1 Robb, 52; *Washburn vs. Gould*, 3 Story, 122, 2 Robb, 206; *Woodworth vs. Edwards*, 2 Robb, 210; 3 Woodbury & Minot, 120; *Woodworth vs. Rogers*, 3 Woodbury & Minot, 135; 2 Robb, 625; *Sloat vs. Spring*, Pamphlet Report of the Trial, Judge Grier's charge, 379 to 385; *Motte vs. Bennett*, 2 Fisher, 642; *Whittemore vs. Cutter*, 1 Gallison, 478; 1 Robb, 40.

The above cases show clearly that Mr. Wilder, by his patent set up in the answer and shown in Exhibit G. to defendant's testimony, gained no right, on account of his improved mode of feeding, to use our pressure rollers and cutters together, which construction is the essence of our invention. They also show very fully that the gearing of our rollers, so as to make them aid in feeding, does not take from them their character and effect as pressure rollers, and acting in a double function.

Nor does the inclination of the rollers, $\frac{1}{4}$ inch in 20 inches spoken of by one witness (Wilder,) change at all their character. They do the same office still,—that is, they hold the board steady, &c. Such a change is merely formal, and not so great as the mechanical equivalents and analagous devices condemned in the following cases: *Gibson vs. Harris*, 1 Blatchford, 167; *Gibson vs. Vandressar*, 1 Blatchford, 532; or as the

springs in *Foss vs. Herbert*, lately decided;[1] or as in placing the cylinder diagonally across the face of the board; and as in the rollers inclined in *Sloat vs. Spring*, pamphlet above cited.

3. The use by the defendant of the tonguing and grooving part of Woodworth's patent without the planing is an infringement. The point was, in fact, ruled in this case on the motion for injunction. But if now open for argument, I refer to *Foss vs. Herbert*, *supra*, where Judge Drummond ruled the very point in his charge to the jury; and also to the following authorities: Curtis on Patents, §245 and note, and cases cited. *Moody vs. Fiske*, 2 Mason, 112; 1 Robb, 312; *Pitts vs. Whitman*, 2 Story, 609; 2 Robb, 189; Curtis on Patents, §§110 and 111, and notes; *Wilson vs. Rosseau*, 4 Howard, 646; 2 Robb, 372; *Wyith vs. Stone*, 1 Story, 273; 2 Robb, 23; *Root vs. Ball*, 4 McLean, 177; 2 Robb, 513; *Hogg vs. Emerson*, 11 Howard, 587; 2 Robb, 655; *Gibson vs. Betts*, 1 Blatchford, 163; *Brooks vs. Fiske*, 15 Howard, 212; *Wilson vs. Barnum*, 2 Fisher, 635; *Potter vs. Wilson*, 2 Fisher, 102; *Sloat vs. Spring*, *supra*.

The recitals of the specification are no evidence of a patent. Cowan & Hills, notes; part 1, 160; part 2, 235–6, and cases cited; *O'Reilly vs. Morse*, 15 Howard, 62; *vide* 5, Statutes at Large, 353, Act of 1839, §6; *Brooks vs. Norcross*, 2 Fisher, 661; Act of 1836, *supra*, §15.

There is nothing in either machine to shake the originality of the Woodworth machine. The Woodworth invention, after twenty-eight years of possession and most severe litigation before courts and juries in almost every circuit of the Union, has never been defeated on the merits, and the originality of the tonguing, &c., and planing conceded as settled, on interlocutory argument, *vide Wilson vs. Rousseau*, 4 Howard, 646; *Woodworth vs. Wilson*, 4 Howard, 712; *Gibson vs. Betts*, 1 Blatchford, 163; *VanHook vs. Pendleton*, 1 Blatchford, 187; *Gibson vs. Gifford*, 1 Blatchford, 529; *Gibson vs. Van Dressar*, 1 Blatchford, 532; *Sloat vs. Spring*, *supra*; *Bloomer vs. McQuewan*, same pamphlet; *Sloat vs. Patton*,

[1] Ante, p. 121.

1 Fisher, 154; *Foss vs. Herbert, ante p.* 121; *Gibson vs. Betts*, 1 Blatchford, 163.

6. The complainant is entitled to a decree for a reference to a master to report the amount due the complainant, with award of execution on confirmation of report, and with costs. *Goodyear vs. Day*, 2 Wallace, Jr., 283; *Allen vs. Blunt*, 1 Blatchford, 480; *Livingston vs. Woodworth*, 15 Howard, 546. For form of decree see *Motte vs. Bennett*, 2 Fisher, 642.

Lockwood & Clark and *Jas. V. Campbell*, for defendants.

McLean, J.—This bill complains of an infringement of the Woodworth patent. It sets forth the original patent granted in 1828, the death of the patentee in 1839, administration of William W. Woodworth, a renewal of the patent in 1842, an extension by act of Congress in 1845, to take effect December 27, 1849, and a surrender and a reissue of the patent on amended specifications in 1845, and a transfer of the patent by the adminstrator to Wilson, and by him to Pitts, the complainant.

In their answers, the defendants do not deny the invention of Woodworth, as to the planing machine, and admit that its validity has been established at law, but they deny from information and belief, that part of this invention, as distinct from the planing machine, which performs the operation of tonguing and grooving. This part of the combination only is in controversy in this case.

No patent in this country has been so much litigated as Woodworth's planing machine. While this affords the highest evidence of its value, it has involved the holder of the patent in an expense which would have been ruinous had not the renewals been granted, as above stated.

In every patent the originality of the invention may be considered open to controversy, as it depends upon facts which may be proved.

The construction of the patent being matter of law, establishes the right, on the facts proved, but, in a subsequent case,

new facts may be proved, showing a prior invention of the same thing.

In his amended specifications, Woodworth claims the combination of the rotating planes with the cutter wheels, for the purpose of planing, tonguing and grooving boards, &c., at one operation as described; and also the combination of the cutter wheels for tonguing and grooving boards at one operation, as described. And finally, the combination of either the tonguing or grooving cutter wheels, for tonguing boards with the pressure rollers, as described,—the effect of the pressure rollers in the operation, being such as to keep the boards, &c., steady and prevent the cutters from drawing the boards toward the center of the cutter wheel, while it is being moved through by machinery. In the planing operation the tendency of the plane is to lift the boards directly up against the rollers, but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers.

The patent having been issued on an examination of the right claimed is *prima facie* evidence of such right.

Woodworth's machine consists of the combination of mechanical powers to plane, tongue and groove plank, at one operation, and he claims the planing as a distinct operation, and also the tonguing and grooving as distinct from that of planing.

In the numerous suits that have been prosecuted, the originality of this invention has not been successfully assailed. So far as regards the construction of Woodworth's patent, and his corrected specifications, it has been so frequently before the federal courts, that it can scarcely be considered now open for controversy.

No new light can, at this day, be expected on the nature and extent of Woodworth's patent. Its originality may be questioned by showing prior inventions; and when an infringement of it is charged, it must be tried by a comparison of the machines. Two machines have been set up in the evidence and argument, as same in principle as Woodworth's and of

prior date. This is objected to on the ground that in the answer these machines are not referred to or relied on as affecting the complainant's right.

At law a notice may be given, and, indeed is essential to authorize such a defense. In chancery the rules of pleading equally require such matter to be set up.

Whether at law or in chancery, a defense in bar of the plaintiff's right must be set up, so as to enable the plaintiff to meet it.

In the case of *O'Reilly vs. Morse*, 15 Howard, 110, the Supreme Court says, "This case must be decided by the testimony in the record, and we cannot go out of it and take into consideration a fact stated in a book of reports. Moreover, we have noticed this case merely because it has been pressed into the argument. The appellants do not mention it in their answer nor put their defense on it, and if the evidence of its priority was conclusive, it would not avail them in this suit, for they cannot be allowed to surprise the patentee by evidence of a prior invention, of which they gave him no notice."

But if the Shakers' machine and Muir's were in evidence, they would not invalidate Woodworth's. The former is rude in structure and impracticable. The Muir machine it would seem from its organization, could not tongue and groove as the Woodworth machine is capable of doing. In tonguing and grooving Woodworth does it by one operation, and the board is subjected to the same pressure. In Muir's it is done by different tools, and at different spaces, and acting in different ways on different spindles, and having different pressures, and in the last part of the operation there seems to be nothing to keep the board steady, consequently the work cannot be complete.

The value of Woodworth's machine consists not in the novelty of its parts, but in their combination. It is not enough to show that other machines have some parts more or less similar to those of Woodworth's. Every part of Woodworth's machine may be found in use in some mechanical operation. The most valuable inventions consist in the combination of

known mechanical powers. Every part of such inventions may be found, in some form, among the various devices of human ingenuity, and the man who unites these powers and produces a new and important result to society is well denominated a public benefactor. It is not the man who may form an imperfect machine, which may suggest to a higher and more practical order of mind valuable ideas, but it is the one who embodies those ideas in a practical and working form whom the law protects.

Whether we examine the descriptions of the machines in controversy, the models furnished, or the opinions of the experts examined, it appears that the machines differ but little in the mode of their structure. The mode of advancing the plank to the cutters, by reciprocating clamps, is relied on mostly, as distinguishing the defendant's from the plaintiff's machine.

In the original written specifications of Woodworth's patent of 1828, there is no claim for pressure rollers on both sides of the cutting cylinder, which confine the board to its place; but in the drawings, these rollers appear at the proper places, and this is sufficient. But in the amended specifications these rollers are described in their combinations for planing, and also for tonguing and grooving. In his original specifications, Woodworth says: "The carriage which sustains the plank or board to be operated upon may be moved forward by means of a rack and pinion, by an endless chain or band, by geared friction rollers or by any of the devices well known to mechanics for advancing a carriage, or materials to be acted upon in machines for various purposes."

It is said by the experts, that the combination of the cutter heads with the pressure rollers constitutes the invention of Woodworth for tonguing and grooving. Some of the experts say, that from their examination of the defendant's machine and also of Woodworth's specifications, they find the combination of Woodworth for tonguing and grooving in defendant's machine.

The effect of the pressure rollers is the same in both. They keep the board steady and prevent it being drawn toward the center of the cutter heads. The revolutions of the cutter wheels in each are from 2,500 to 3,000 strokes a minute.

Take out the surface planing knife from Woodworth's machine and there remains no difference between it and the defendant's machine for tonguing and grooving, except the mode of feeding. And the mode of feeding is mainly relied upon as showing a difference in principle between the two machines. But if the invention of Woodworth consists in the combination of the cutter heads with the pressure rollers, then it is clear there is an infringement, as the whole of the combination is used. And it is no less an infringement if the mode of forcing the board forward be an improvement on Woodworth's machine. In such a case the defendants would have no more right to use the invention of Woodworth than the plaintiff would have to use the improvement of Wilder.

But Woodworth in his specifications says: "In a single horizontal machine the friction rollers may be geared, and the pressure rollers placed above them, to feed the board, with or without the carriages." And again: "In the present instance, the plank is supposed to be advanced by means of one or two pairs of friction or feed rollers, shown at F. F. The uppermost F. F. of the pairs of rollers may be held down by springs or weights, levers, &c. The lowermost of these rollers may be fluted, or made rough on their surfaces, so as to cause friction on the underside of the plank." In the summing up he spoke of the pressure rollers as described, to keep the board steady, &c.

The entire specifications may be examined to ascertain the claim of the patentee. The specifications, and also the drawings constitute a part of the patent.

The claim of the "combination of the tonguing and grooving cutter wheels, for tonguing and grooving boards, and the combination of either the tonguing or the grooving cutter wheels, for tonguing or grooving boards, &c., with the pressure rollers as described," is a claim, not only for tonguing

and grooving by one operation, but also for tonguing and grooving separately, with the pressure rollers.

The plank in tonguing and grooving, as well as in planing is moved against the cutting knives by rollers, which, in his original patent, is described as "geared friction rollers, to move forward the board." Now if the machinery to force the board against the cutting knives, in tonguing and grooving, or in planing, is in Woodworth's combination, can it be objected that the rollers are not, as often as named in the specifications called feeding rollers? They perform that office, and whether feeding, friction, or pressure rollers is immaterial. The machinery is there and the principle on which it operates is seen, and this is sufficient to sustain the patent.

The reciprocating, or eccentric clamps, as they are called, are in effect feed rollers. "Where one clamp is on the board to shove it ahead, the other one is drawing back to get a new hold, and is not in contact with the board." And in this way the clamps seize the board alternately, and push it forward. At the same time they act as a pressure roller.

This is a clumsy attempt to avoid the Woodworth patent for tonguing and grooving, by the substitution of these clamps for the rollers of Woodworth, which propel the board on the cutting knives.

Woodworth calls for feed and pressure rollers, and says that the plank may be moved forward by other means. Now a patent in calling for a specific mode, embraces in law all mechanical equivalents, or modes which operate on the same principle, consequently all modes, however changed in form, but which act substantially on the same principle, and effect the same end, are within the patent. If this were not so, a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill.

As it appears from the evidence that the infringement of the plaintiff's patent was free from any aggravated circumstances, and was the result of a conviction by the defendants that they were protected by Wilder's patent under which they were licensed, they will be held responsible in damages only for the

profits realized after a deduction of all expenses, &c., in carrying on their operations.

WILKINS, J., concurring.

PORTER vs. VIETS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST TERM, 1857.

1. CONTRACT FOR FUTURE DELIVERY.—A contract for the sale and delivery of grain which the party did not have nor expect to have, is nevertheless valid.

2. NOT A WAGER—INTENTION TO SETTLE "DIFFERENCE" CANNOT BE SHOWN.—Such a contract is on its face strictly legal, and is not a wager, and the defendant cannot be permitted to show that the intention of both parties was, that no grain should actually be delivered, but that the "difference" should be settled between them in cash.

3. Although it is true that by a settlement of the "difference" the same result is reached as in a wager, that circumstance does not make the original contract the same.

4. The defendant, in order to establish the illegality of the written contract, cannot establish orally a simultaneous contract alleged to be illegal.

On the third of April, 1857, the defendant, Viets, entered into a contract in writing with the plaintiffs, by which he sold them fifteen thousand bushels of corn at forty-eight cents a bushel, deliverable free on board, during the last half of June. The plaintiffs were to pay for the corn on delivery. Both parties executed the contract. The corn not being delivered, suit was brought on the contract. At the time the corn was to have been delivered, it had risen to sixty-three cents a bushel, so that the "difference" was over two thousand dollars.

The defendant set up in defense that at the time of making the contract he was not possessed of the corn, nor had he entered into any contract for the purchase of the same, nor had he any expectation of obtaining the corn; that it was not intended by the parties that the corn should be delivered, but

that it was a contract for the payment of the "difference" between the price mentioned, and its market value at the time of delivery; in fine, that it was nothing more than a wager between the parties as to the price of corn at the time fixed on, and that the contract was only a cover to the real intent of the parties, which was merely a bet and no more.

Plaintiffs demurred to plea.

Hon. S. W. Fuller, for plaintiffs.

Mr. Stuart, for defendant.

DRUMMOND, J.—Whatever doubts may have formerly existed, it must now be considered the settled law, both in England and in this country, that the mere fact that a man may not have in his possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article. He is bound by his contract, nevertheless, and must deliver the property or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time possess the property, would interfere too much with commercial contracts. People might differ about the propriety of a man making such a contract who did not know certainly where he was to acquire the property, but having made it, the courts will compel him to abide by it.

Stock contracts have in some of the states been placed under certain restrictions by the legislature, but there has been no legislation touching such contracts as this before the court. If corn had fallen fifteen cents a bushel, Viets would of course have insisted on Warren Porter & Co., complying with their contract.

Both parties entered into it with full knowledge of the risk they run, and the court will not help one of them because his judgment was unsound or because something occurred that he did not foresee.

If it be said that it causes personal or combined efforts to be made to affect the price of the article, of that also the parties were fully aware before they made the contract. In this respect they stood on terms of equality.

It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings in the case, but that it was an agreement to pay the difference between the price of corn as stated, and the price at a future day—in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it that it is *the contract* between them. It cannot be shown verbally that something different was intended at the time from what appears in the writing.

It is a rule resting upon the soundest principles, and one of uniform application. Here no fraud is pretended. The contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing. The defendant says he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party that was to win or lose was to depend upon the market price of the corn. Now it may be true that the result is precisely the same—that is, the one party loses and the other gains the same amount as in a wager. So it is in any case of this kind, when a party does not perform his contract. But that circumstance does not make the contract the same. In the case of a wager on the price, when a man pays the "difference," he performs his contract, but he does not fulfill this contract by paying the difference. He meets the penalty the law imposes for a breach of it. Here this defendant wishes to establish orally that another contract was made at the time not in writing and which he alleges was illegal, in order to make out the illegality of the

written contract. This cannot be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed, and so get rid of a written contract on its face unexceptionable.

Demurrer sustained and judgment for plaintiffs.

A contract for the sale of goods at a fixed price, to be delivered at a future day, the vendor not having the goods nor any means of acquiring them except by purchase, is not a gambling contract. Stanton *vs.* Small, 3 Sandford, 230; McIlvaine *vs.* Egerton, 2 Robertson, 422,—[*Reporter.*

THE CLEVELAND INSURANCE COMPANY *vs.* REED.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM, 1857.

IN EQUITY.

1. ATTORNEY CANNOT ACQUIRE TITLE AS AGAINST PRINCIPAL.—Where an agent, by virtue of a power of attorney, conveys the property of his principal and takes a conveyance to himself, and then mortgages it, such use of the power of attorney would not give him the title as against his principal.

2. Though the principal might have repudiated the acts of his attorney, a purchaser under decrees of foreclosure of prior mortgages, being a stranger to the transaction, cannot object to the validity of the mortgage; but he can inquire into its true consideration.

3. Usury must be specially pleaded or specifically set forth in the record, and supported by evidence, or the court will not inquire into it.

4. FORECLOSURE SUIT.—HOW BARRED—The statutory limitation of ten years should be applied to a bill to foreclose filed seventeen years after the mortgage debt was due, the mortgagee having notice that the land had been sold under prior mortgages, and for taxes, and that the purchaser was in possession, claiming title. This is true, although the statute was passed subsequent to the maturity of the mortgage debt.

5. Without such a statute equity would not disturb the possession or title of such a purchaser, he having been in possession fifteen years to the knowledge of the mortgagee. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity.

6. SUBSEQUENT MORTGAGEE NOT MADE PARTY.—Nor will the fact that the mortgagee was not made a party to the bills foreclosing the prior mortgages, under the circumstances of this case, enable the bill to be sustained.

7. Cases under the statute of limitations cited and commented upon.

8. COMMON LAW LIMITATIONS REGARDED IN EQUITY.—Statutes for foreclosure and redemption are rules of property, and also laws of limitation; and in the absence of laws limiting proceedings in equity, the limitations as to similar demands at common law are considered as proper rules to be observed in courts of chancery.

The facts are fully stated in the opinion.

Butler & Buttrick, for complainant.

James S. Brown and *Waldo & Ody*, for defendants.

MILLER, J. This is a bill filed in February, 1856, against George Reed and wife, James H. Rogers, and the Milwaukee & Mississippi Railroad Company, to foreclose a mortgage for $22,000 executed by George Reed and wife to complainant, dated February 10th, 1837, and recorded in April of the same year, covering certain lots in Finch's addition to Milwaukee, and thirty-six acres of land in the county of Milwaukee.

Reed answers, admitting the execution of the mortgage, and that the same is due and unpaid, and pleads a discharge under the bankrupt law of the United States in December, 1842.

Rogers, in his answer, says that he is the owner in fee simple of the property in Finch's addition, and of which he had been in the full and actual possession as owner for nineteen years; that he has resided in Milwaukee constantly, where he could at all times be found; that he has been in the actual occupation of the land for more than ten years since the right of action on the mortgage accrued, and before the commencement of this suit, and that the right of action is barred by the statute of limitations of this state.

He further says that the property in Finch's addition was and still is the property of Curtis Reed, and that neither George

Reed nor the complainant ever had any title to or equitable lien or claim upon it; that George Reed never had any business transactions with complainant, except through Edmund Clark, the President and owner of the controlling interest of the capital stock; that George Reed on the 10th of February, 1837, as the attorney in fact of Curtis Reed, and by virtue of a power of attorney to sell and lease, dated June 23, 1836, conveyed the property by warranty deed to Clark, who at the same time re-conveyed by quit-claim to George Reed for the nominal consideration of $30,000, and he then executed these notes and mortgage to complainant; the whole being one transaction, in the absence of and without the knowledge or consent of Curtis Reed, and with intent to defraud him.

Rogers also sets forth that Curtis Reed, prior to the execution of above instruments, gave two mortgages upon these premises to one Nathaniel Finch, which were recorded prior to the mortgage to complainant, and assigned to him, Rogers, before maturity, and afterwards foreclosed in the Territorial District Court, and the land was sold to him, and the sale duly confirmed. He also claims title by deed from the assignee of George Reed, and under tax deeds, and insists that the cause of action is stale, and should not be enforced in equity; that it is nowhere stated in the bill that the money claimed to have been loaned was a part of the capital stock of the company, and that the charter of the company gave it no power to deal in real estate, or to loan money other than its corporate funds, for which reason the mortgage is void; that the company has long since ceased to exist; and that the transaction is usurious, and the conveyance and mortgage were a device to avoid the usury laws.

Everything connected with the transaction excludes the idea that the mortgage is upon any land in that section, but Curtis Reed's. The purchase by Rogers of George Reed's interest in the section of land, at his assignee's sale, does not affect this mortgage. George Reed's bankruptcy and the proceedings and sale under it have nothing whatever to do with this case, so far as Rogers is concerned. The return of this debt by George Reed, in the schedule annexed to his petition in bank-

ruptcy, cannot in any way affect the interests or rights of Curtis Reed or Rogers in regard to the mortgage or the mortgaged premises.

This mortgage was a security for money loaned, and the insurance company had authority by its charter to take security for money loaned, as part of its capital.

Clark testifies that the amount paid Reed was entered on the books of the company, as paid by it; that he made the arrangements with Reed after consulting some of the directors; that eleven thousand dollars, part in cash and part in paper was the true sum advanced, the other eleven thousand dollars being simply a guaranty, that the mortgaged premises would be worth the amount, when the notes should become payable; that a private note of $3,000 was given by Reed as a penalty to ensure the punctual payment of the notes. The notes were given in Ohio, and were made payable in New York. The pleadings do not authorize the court to inquire into the subject of usury; they are altogether too indefinite and uncertain. Usury must be specially pleaded, and the evidence must sustain the plea. The whole transaction appears to have been a desperate device of George Reed, to make a raise of money, and an unwarrantable scheme of Clark to embarrass a customer. It is certain that George Reed could not use the power of attorney so as to acquire title adverse to or exclusive of his principal, Curtis Reed. The mortgage is in equity, the mortgage of Curtis Reed, though the notes are at law George Reed's personal obligations.

A power to sell lands, usually includes a power to mortgage, but a mortgage under such a power for a greater sum than is actually loaned may be repudiated by the principal.

Curtis Reed might have required the cancellation of the conveyances and mortgage, at all events upon payment of the sum loaned. But Rogers is a stranger to the transaction, and he cannot make the objection to the validity of the mortgage. He can only cause inquiry to be made of its true consideration, if it is a lien on his land.[1]

[1] Jackson *ex dem.* McCarty *vs.* Van Dalfsen, 5 Johnson, 43; Childs *vs.* Digby, 24 Pennsylvania State, 23.

Rogers became the assignee of the two mortgages of Curtis Reed to the Finches, dated in April, 1836. In pursuance of decrees of the district court for Milwaukee county, at the suit of Rogers against Curtis Reed, Edmund Clark, and others, the mortgaged premises were sold in satisfaction of those mortgages to Rogers, and a deed was made to him of the premises, by the master, according to the order of confirmation of the sales. Those mortgages being prior liens, Rogers became the purchaser of the legal title. The mortgage in suit is dated in February, 1837, and is of Curtis Reed's equity of redemption merely. An ejectment would not lie, at the suit of this mortgagee against Rogers, the owner of the legal title. The only remedy of the complainant is by bill in equity for the sale of the mortgaged premises, which is this bill, or for redemption, and the subject matter is of the peculiar and exclusive jurisdiction of a court of equity.

At the date of this mortgage there was no statute limiting suits in equity. An act went into force in the month of January, 1839, that "bills for relief in case of the existence of a trust not cognizable in the courts of common law, and in all other cases not herein provided for, shall be filed, within ten years after the cause thereof shall accrue, and not after." This limitation was continued in the state statutes of 1849, and is now in full force. This mortgage is dated February 10, 1837. The first note is payable in twelve months, the second in eighteen months, and the third in two years. When the act of limitations went into force, the cause of action had accrued. This court will administer statutes of limitation of the state as rules of property. I shall proceed to inquire whether the statute is applicable to this case.

This case is one of the "cases not provided for" in the statute. If the word hereafter had been inserted in the statute (as in similar laws of some of the states) so that it would read "hereafter accrue," the question would be relieved of doubt. The statute seems to direct the attention to such causes of action as shall accrue, and not to those that have then accrued. The Supreme Court of this state has applied this statute to

causes of action accrued at the time of its enactment.[1] This statute was copied from the statute of the State of New York. In that state a contrary application of the statute was made in *Williamson vs. Field*, 2, Sanford's Chancery 533, and cases cited. In those cases the general rule is announced, that no statute is to have a retrospect beyond the time of its commencement, and to affect vested rights unless expressly so declared. But in the subsequent case of *Spoor vs. Wells*, 3 Barbour's Chancery 199, it is decided that an equitable claim, upon which a bill in chancery could have been filed previous to the time when the statute first took effect, and, when the complainant was under no disability, is barred by the provisions of the statute at the expiration of ten years after the statute went into operation. The statute of the State of Massachusetts, in its general provisions as to claims that shall accrue, is the same as the statutes of New York and of Wisconsin, and a similar application is there made.[2] The Legislature of the State of Mississippi passed an act, in the month of February, 1844, that judgements rendered before the passage of the act in any other state of the Union, should be barred, unless suit was brought thereon within two years after the passage of the act. In the case of the *Bank of Alabama vs. Dalton*, 9 Howard, 522, it is decided by the Supreme Court of the United States that the act could be pleaded in bar to an action on a judgment rendered in the State of Alabama one year previous to its passage, and that the Constitution of the United States did not prohibit that legislation as a law impairing the obligation of contracts. The time and manner of the operation of statutes of limitations generally depend on the sound discretion of the legislature. Cases, though, may occur where the provisions of a law may be so unreasonable, as to amount to a denial of right, and call for the interposition of the court.

A statute of limitations affects the remedy, not the contract, where a reasonable time is given for bringing suit on existing

[1] Fullerton *vs.* Spring, 3 Wisconsin, 667; Parker *vs.* Kane, 4 Wisconsin, 1.
[2] Smith vs. Morrison, 22 Pickering, 430.

demands.[1] In *Ross & King vs. Duval*, 13 Peters, 45, the court remarks:—"It is a sound principle that where a statute of limitations prescribes the time within which suits shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act, and the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases." From a careful examination of the case of *Murray vs. Gibson*, 15 Howard, 421, it will appear that the decision does not conflict with the previous decisions of the court. The act of the State of Mississippi, passed in March, 1846, as an amendment to the limitation law of the state, provided that, "no record of any judgment recovered in any court of record without the limits of the state against any person who was at the time of the commencement of the suit, on which the judgement is founded, or at the time of the rendition of such judgment, a citizen of this state, shall be received as evidence to charge such citizen, after the expiration of three years from the time of the rendition of such judgment without the limits of this state." The declaration was in debt on a judgment rendered in the State of Louisiana, in the month of November, 1844. By the literal terms of the act, the rights of a judgment creditor seem to be made dependent, not on his diligence in the institution or prosecution of his suit, but upon the trial of the action on his judgment, which is an event over which he has no control. The peculiar language of the act, if taken in its literal acceptation, might suggest a serious doubt as to the compatibility of its provision with the principles of common right, or with the federal Constitution. For these reasons the courts construed the law to relate to the time of bringing the suit and not to the time of offering the record in evidence at the trial, and also confined its operation to judgments rendered in other states after its

[1] Jackson *vs.* Lamphire, 3 Peters, 280; Sturges *vs.* Crowninshield, 4 Wheaton, 122; Bronson *vs.* Kinzie, 1 Howard, 311; McCracken *vs.* Hayward, 2 Howard, 608; Lewis *vs.* Lewis, 7 Howard, 776; McElmoyle *vs.* Cohen, 13 Peters, 312; Call *vs.* Hagger, 8 Massachusetts, 423; Holyoke *vs.* Haskins, 5 Pickering, 20; Smith *vs.* Morrison, 22 Pickering, 430; Morse *vs.* Goold, 1 Kernan, 281.

date. In addition to these reasons the law of the same state as then existing, and on which the case of the *Bank of Alabama vs. Dalton* was ruled, was applicable to the case of *Murray vs. Gibson*, and would have barred it if pleaded. The court applied the law to judgments rendered after its date, to prevent the injustice intended by the legislature, of excluding judgment records at the trial. The court remarks, "That laws should be so construed as not to allow a retroactive operation, where this is not required by express command, or by necessary or unavoidable implication. Especially should this rule of interpretation prevail, when the effect and operation are designed, apart from the intrinsic merits of the rights of parties to restrict the operation of those rights."

This bill was filed nineteen years after the date of the mortgage, seventeen years after the whole cause of action had accrued, and sixteen years and five months after the statute of limitations went into force. The complainant was under no legal disability, and might have brought suit before the ten years prescribed by the law had expired. I am of the opinion that this case should be considered as barred by the statute, but it is not essential to the proper disposition of the case, that the bill be dismissed on this ground.

In the year 1840 the sales to Rogers, in the foreclosure of the Finch mortgages, were confirmed, and deeds were executed and delivered, when he went into possession. Clark testifies that "I think I first began to look after his real estate in 1841 or '42. We got a man, who was going up there, to look into it, and he came back with rather a poor story. I first learned that James H. Rogers was in possession of the property ten years ago, perhaps more. I wrote to some gentleman in Milwaukee, and they wrote me that Rogers was in possession, claiming title. The information which John W. Allen gave us, whom we requested to look after our interests in Milwaukee, and who went there, was, that the thirty-six acres embraced in the mortgage had been foreclosed and sold on a previous mortgage, and that the twenty acres in Finch's addition embraced in the same mortgage had been sold at several tax sales, and

that it was not then valued at over ten dollars per acre. This statement was made in 1841 or '42. This Mr. Allen was the first President, and a stockholder in the Cleveland Insurance Company." Rogers has continued in actual possession, and has paid the taxes mostly by suffering the property to be sold, and then taking deeds, and has made valuable improvements. The property has become very valuable, not from any labor, expenditure, or exertion of the complainant. It is the policy of this new state that titles should be quieted. The growth and improvement of the state requiring this policy, the legislature have wisely limited the time for bringing ejectments to ten years. Clark, the controlling officer of the insurance company, had notice by his agent and a stockholder of the company, that Rogers was in possession fifteen years before this bill was filed. From these facts, this bill should not be maintained at this late day. From the delay in bringing suit, after the notice that Rogers was in possession, claiming title to the land not considered worth the costs of a suit, the claim may be considered as abandoned or stale. In this respect this case somewhat resembles the case of *McKnight vs. Taylor*, 1 Howard, 161 in which it was remarked by the court—"In relation to this claim, it appears that nineteen years and three months were suffered to lapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. * * * If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment, for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse

to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in the case of *Piatt vs. Vattier*, 9 Peters, 405; and that nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence, and where these are wanting, the court is passive and does nothing, and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court." The demand is not to be favored, even for the amount actually loaned, on account of the circumstances attending the negotiations, and for the reason of the delay in either redeeming the land from Rogers, or instituting proceedings for such redemption. In this case, on the part of the complainant, there is a want of conscience, of good faith, and of reasonable diligence, and upon the principle and spirit of the statute of limitations, and also of the policy of the country, this claim should not, at this late day, be enforced in a court of equity against Rogers.

This suit was sought to be maintained, on the ground that the equity of redemption of the Cleveland Insurance Company was not barred by the foreclosure of the Finch mortgages, as it was not made a party defendant on the record of those cases. If this complainant had been nominally made a defendant in those cases, there would be no doubt of its foreclosure by those decrees of all equity of redemption as a subsequent mortgagee, even if the proceeding had been against it, by a newspaper publication of a rule to appear and plead, answer or demur, according to the statute. Why Edmund Clark was made a defendant and the Cleveland Insurance Company was omitted cannot be accounted for, unless from the nature of the several conveyances and the active agency of Clark in the negotiation, it was supposed that the mortgage was taken nominally in the name of the company for his use. In the whole business the name of the company only appears as payee of the notes and as mortgagee. The business was transacted by Clark without

authority from the directors of the company, by a vote of the corporate body. There is no pretence that the directors entered on the minutes or records of the corporation any resolution or order authorizing Clark to consummate the negotiation by those deeds to and from himself, and to take the mortgage in the name of the company for double the sum actually loaned. Clark swears "that he did not know whether it was the funds of the company or his own funds that were advanced to Reed, and also, that if the company would not advance the money he would." From a subsequent examination of the books of the company and of memoranda, it may be inferred that the money advanced was the funds of the corporation. But be this as it may, Clark was the president of the company, the owner of the principal part of the stock, and the business man of the company. Under these circumstances, it was quite convenient for him to take a mortgage in the name of the corporation to secure a debt of his own, particularly in such an unconscientious transaction. He had the controlling power of the company. If he consulted the directors it was but mere matter of form. He was the company for all business purposes, and he testifies that he and the company had notice by their agent one or two years after the sale to Rogers, that he, Rogers, was in possession of the mortgaged premises claiming title.

If Rogers was claiming title, either by virtue of his purchase under the decrees of foreclosure of the Finch mortgages, or by purchase at sales for taxes, it was the duty of the Cleveland Insurance Company, by its officers or agents, upon the receipt of the notice, to have redeemed the land from those sales. They at the same time had notice that the land was not considered worth over ten dollars per acre, which would not warrant the expenses and disbursements required for redemption. Under these circumstances, it would not be equitable or just to decree, at this late day, after the land had become valuable, that Rogers' title and possession should be disturbed, for the mere omission of the Cleveland Insurance Company as a nominal defendant in the bills and proceedings to foreclose prior mortgages. If the Finch mortgages had been foreclosed by a newspa-

per advertisement and sale, in pursuance of authority in the mortgages, the Cleveland Insurance Company would have been entitled by law to redeem within two years. By the law then in force, the mortgagor had two years time to redeem from such sale, and "any person to whom a subsequent mortgage may have been executed shall be entitled to the same privilege of redemption to the mortgaged premises, that the mortgagor might have had, or of satisfying the prior mortgage, and shall by such satisfaction acquire all the benefits to which such prior mortgagee was or might be entitled." And the law directs that if the mortgaged premises so sold shall not be redeemed, the officer making such sale shall make a deed to the purchaser. And if there is an overplus of purchase money on hand, it shall be retained for subsequent incumbrances.

In the proceedings in court to foreclose the Finch mortgages, Clark, as a non-resident not served with process, was entitled by law to three years time to come in and petition the court to open the decree as to him, for the use of the insurance company. But, by the law, if such application be not made, the decree shall be adjudged to be confirmed, which confirmation shall have relation to the time of making the decree. And by law, land sold under execution was redeemable by the owner within two years after the sale, and a creditor by judgment or decree could acquire the interest of the purchaser within three months after. These several laws are rules of property, strictly observed, as to time, in all cases, and they are also laws of limitation. They fully demonstrate the policy of the state in regard to sales of land for the payment of debts. In the absence of laws limiting suits and proceedings in equity, the laws of limitation as to similar demands in courts of law are considered as rules proper to be observed in courts of chancery. From analogy to these laws, it is questionable whether a subsequent mortgagee, not named as a party in a bill to foreclose a prior mortgage, shall be allowed to redeem after two years. I am aware that the opinion prevails that such redemption cannot be denied, as the person claiming it was no party to the proceedings in court. The opinions of

some courts favor this idea. But in several of the States a proceeding in court, and a decree against the prior mortgagor and *terre tenant* are sufficient to bar all subsequent incumbrances. The proceedings in court are open; the advertisement and sale are supposed to be known to all persons interested, who should attend the sale and bid up the property to cover their liens.

Every person is expected to look after his mortgages and liens, within a reasonable time. But whether a subsequent mortgagee should be limited in equity to redeem within two years, by analogy to the statute referred to, I need not now determine. But that he should redeem within a reasonable time, there is no doubt. The company, through its officers and agents, had notice of Rogers' possession under claim of title, and the land should have been redeemed from the sale within the two years, or a reasonable time thereafter. The complainant was under no disability to proceed on its mortgage, nor has Rogers done any act to delay or prevent a redemption or sale of the land. The complainant has done no act to enhance the the value of the land, while Rogers has. The complainant cannot be allowed to profit by the delay, at Rogers' expense. For these reasons the court will not order a decree on this bill, that would disturb the possession or title of Rogers, or require him to pay the sum with interest, advanced to George Reed.

Rogers disclaims title to, or interest in the property in Finch's addition, consequently there is no decree to be ordered against him as to that. George Reed was discharged from his debt under the late bankrupt law, and he is thereby released from all personal responsibility or liability on the notes and mortgage.

The Milwaukee and Mississippi Railroad Company, I presume, was made a defendant, as claiming the right of way through section thirty. There are no parties, then, against whom a decree could be made in regard to the thirty-six acres. But if that land was sold under a decree in the case of Increase A. Lapham, as set forth in Rogers' answer, I presume the complainant has no claim of lien against it. If so, the bill will be dismissed as to both tracts. Bill dismissed.

That agent cannot acquire title as against principal. Ringo *vs.* Binns, 10 Peters, 269; Church *vs.* Marine, Insurance Company, 1 Mason, 341; Galbraith *vs.* Elder, 8 Watts, 81; Barker *vs.* Marine Insurance Company, 2 Mason, 369; Hall *vs.* Hallett, 1 Cox, 134; Lees *vs.* Nuttall, 1 Russell and Mylne, 53; Andrews *vs.* Mowbray, 1 Wilson's Exchequer R., 71; Whichcote *vs.* Lawrence, 3 Vesey, Jr., 740; *Ex parte* James, 8 Vesey, Jr., 348; Chalmer *vs.* Bradley, 1 Jacob and Walker, 59; Whitcomb *vs.* Minchin, 5 Maddock, 62; Norris *vs.* Tayloe, 49 Illinois, 18; Collins *vs.* Case, 23 Wisconsin, 230; Grumley *vs.* Webb, 44 Missouri, 444.

It is the settled doctrine of courts of equity that great delay of either party, unexplained, in not prosecuting his claims constitute such laches as forbid the interference of a court of equity. Hough *vs.* Coughlan, 41 Illinois, 130.

The statute of limitations binds courts of equity as well as law in cases of concurrent jurisdiction; and sometimes, by way of analogy, binds equitable titles. STORY J., in Pratt *et al vs.* Northam *et al*, 5 Mason, 95.

As to doctrine of courts of equity, as to limitations, laches, and stale claims, see opinion of CLIFFORD J., in Badger *et al, vs.* Badger *et al*, 2 Clifford, 137; also, Ferson *vs.* Sanger, Daveis R., 252..—[*Reporter*.

THE JOSEPH GRANT.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—OCTOBER TERM, 1857.

IN ADMIRALTY.

1. BILL OF LADING SIGNED IN BLANK, VOID. — Although the master of a vessel employed in navigating the lakes is agent of the owners for giving bills of lading for goods shipped on board, he has no authority from the owners to sign bills of lading in blank, and a bill of lading so signed is not valid against the owners, even in the hands of a *bona fide* holder.

2. A bill of lading signed in blank by a master is no maritime contract binding on the vessel or owner.

3. Where two bills of lading describing the cargo shipped, were made out in full; one of which was signed by the master, and the other by the shipper, and a third one was signed in blank by the master and left with the shipper, who, after departure of the vessel, filled up the blank bill with a change of the consignee, and transferred it to a bank as collateral security for advances for the

owners of the cargo, no maritime contract is thereby created between the bank and the vessel without notice to the master before delivery of the cargo according to the first bill of lading sent with the vessel.

4. The owner of the vessel is not estopped from having the circumstances attending the signing and transfer of the blank bill of lading inquired into by the court.

Fitzhugh & Littlejohn, millers, in Oswego, New York, by George M. Chapman, their agent, in Chicago, were purchasing and shipping grain from that place to Oswego, Chapman from time to time drawing on his principals, through the Marine Bank of Chicago, and procuring from the bank advances on the security of bills of lading. The schooner, Joseph Grant, on the 19th of August, 1857, was freighted at Chicago, with 18,744 bushels of corn to be transported to Oswego and delivered to Fitzhugh & Littlejohn. Duplicate bills of lading were made out, consigning the corn to Fitzhugh & Littlejohn. One bill was signed by the master, and one by Chapman, which the master retained as his guide in the delivery, and the third was signed by the master in blank. From three to five days after the vessel departed, Chapman, having occasion to give the bank a bill of lading to cover advances on drafts, filled out the blank bill in every respect the same as the other two, except as to the consignee which was "account Marine Bank, care Delos DeWolf, cashier, for Fitzhugh & Littlejohn, Oswego, New York."

The vessel in due time arrived at Oswego, and the master delivered the cargo to Fitzhugh & Littlejohn, on the 5th of September, according to her bill of lading, signed by the agent, without notice or knowledge that the third bill of lading had been filled up with a different consignment, and delivered to the bank. Two or three days after the receipt of the cargo by Fitzhugh & Littlejohn, they failed in business. This libel is brought by the bank against the vessel for not delivering the cargo on account of the Marine Bank to Delos DeWolf for Fitzhugh & Littlejohn. It did not appear that the bank had notice that the bill of lading had been signed in blank by the master and filled up by Chapman after the departure of the

vessel, until after the failure of Fitzhugh & Littlejohn. Nor had the bank notice that the bills of lading, under which the vessel departed, consigned the cargo directly to Fitzhugh & Littlejohn. The bank knew that this firm was the owner of the cargo.

Wm. P. Lynde, for libellant, cited *Bush vs. Person*, 18 Howard, 82; Parsons on Maritime Law, 346; Chitty on Carriers, 250; *Dickerson vs. Seelye*, 12 Barbour, 100; *Violett vs. Patton*, 5 Cranch, 142; *Howard vs. Tucker*, 1 Barnewall and Adolphus, 712

Mr. Emmons, for claimant, cited *Craighead et al vs. Wilson*, 18 Howard, 199; *Grant et als. vs. Norway et als* 2 English Law and Equity, 337; *Warden vs. Greer*, 6 Watts, 424; Abbott on Shipping, 408–9–10–14; *Low vs. De Wolf*, 8 Pickering, 101; *Allen vs. Williams*, 12 Id. 297; *Salem Bank vs. Gloucester Bank*, 17 Massachusetts, 1.

Miller, J. So far as a bill of lading partakes of the character of a receipt, it is open to explanation between the parties to it, but as a contract, when legally executed by the proper party, in the proper and usual manner, the master or owner of a vessel shall not be permitted to show a mistake in stating the destination of the property, unless when fraud or imposition is practiced on the party.[1]

The masters of vessels employed in the lake trade are considered the agents of the owners, to sign bills of lading of goods received on board for transportation. Usually triplicate bills of every shipment are made out,—one is signed by the shipper, which goes with the vessel as a guide for delivery, two are signed by the master, one of which is retained at the place of shipment, and the other is forwarded to the consignee. The master is the general agent of the owner, and his acts in the scope of his duties as such bind the vessel. In the exercise of the duties of a general agent, the liability of the principal depends upon the fact that the act was done in the ex-

[1] Flanders on Shipping, §479, and note.

ercise and within the limits of the powers delegated. The acts of agents do not derive their validity from professing, on the face of them, to have been in the exercise of their agency. But the facts in relation to the powers and duties of general agents are necessarily inquirable into by the court.[1]

The bank did not acquire an interest in the cargo or any service of the vessel by the shipment. It became an apparent assignee of the cargo, subsequent to the date of the bill of lading and the departure of the vessel. The libel raises the question, whether the bill of lading created a maritime contract between the master and the bank binding on the vessel, to estop the owner from inquiring into the circumstances attending it. The owner is not estopped from enquiring into the necessity of a sale of his vessel by the master, or of his creating a lien by a bottomry bond, or of his purchase of supplies. Maritime liens are *stricti juris*, and will not be extended by implication or construction.[2]

When the master, as agent, receives goods on board, and gives a bill of lading, a contract is made between the shipper and the vessel. But he cannot bind either the vessel or its owner by a receipt for goods not delivered on board, for it is not a contract entered into by the master in good faith, or within the scope of his authority; and the general owner is not estopped from proving the facts, even against a *bona fide* holder of the bill of lading.[3] The master has no apparent authority to sign a bill of lading for goods not actually shipped, and there can be no implication that the owner of the vessel consented that false pretences of contracts, having the semblance of bills of lading should be created as instruments of fraud; or that if so created they should in any manner affect him or his property. To sign a bill of lading made out in full, describing the goods shipped, is within the authority of the master, but

[1] Mechanics' Bank *vs.* The Bank of Columbia; 5 Wheaton, 326.

[2] Vandewater *vs.* Mills, 19 Howard, 82; Thomas *vs.* Osborn, Id., 22; Pratt *vs.* Reed, Id., 359; Tod *vs.* The Sultana, Id., 362.

[3] Grant vs. Norway, 2 English Law and Equity, 337; Schooner Freeman vs. Buckingham, 18 Howard, 182.

not a blank bill. A blank bill of lading is no contract binding on the vessel or owner. The master has no implied authority from the owner to sign any such paper. An agent of limited powers cannot bind his principal when he exceeds those powers.[1] Signing a blank bill of lading by the master should no more bind the vessel, than signing a bill of lading of goods not put on board,—or putting goods on board without the knowledge or consent of the master or receiving officer; but in such case the vessel may charge for freight of goods actually carried.

The vessel departed from Chicago, under a bill of lading signed by the owners of the cargo by their agent, and by the master, in which the cargo was consigned to said owners, Fitzhugh & Littlejohn. The cargo was so delivered in due course, without any knowledge on the part of said owners, or of the master, of the third bill of lading having been filled up and delivered to the Marine Bank. The vessel had no goods on board consigned to Delos DeWolf, cashier, on account of the Marine Bank, for Fitzhugh & Littlejohn. No maritime lien attached to the vessel in favor of the bank, and the libel must be dismissed with costs.

For a discussion of the rights of a *bona fide* transferee of a bill of lading as against the consignee, see Marine Bank *vs.* Wright, 46 Barbour, 45.

If master signs bill of lading for goods never shipped, principal not bound. See cases cited in 1 Parsons on Shipping and Admiralty, 190. Or for greater quantity than actually on board, Hubbertsty *vs.* Ward, 8 Exchequer, 330.

Master cannot, by signing bill of lading for goods not on board, charge the vessel or owner. And where bill of lading was signed upon misrepresentation, the vessel is not liable even to a *bona fide* holder. The Loon, 7 Blatchford, 244. —[*Reporter.*

[1] Schimmelpennich *vs.* Bayard, 1 Peters, 264; Manella *vs.* Barry, 3 Cranch, 415; Lanusse *vs.* Barker, 3 Wheaton, 101; Parsons *vs.* Armor, 3 Peters, 413; Owings *vs.* Hull, 9 Peters, 607.

WILLIAMSON vs. THE NEW ALBANY, &C., RAILROAD COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—OCTOBER TERM, 1857.

IN EQUITY.

1. APPOINTMENT OF RECEIVER.—The appointment of a receiver of the property of a railroad company in the foreclosure of a mortgage, is not a matter of course, on default of payment of interest, but is a matter resting in the sound discretion of the court.

2. POWERS OF TRUSTEE.—A railroad corporation had given a deed of trust of all its property present and to be acquired, to secure certain bonds, which were negotiated. By the provisions of this deed, the trustee, on default of payment of either principal or interest of said bonds, or any part thereof, might take possession of said property, or, on the written request of the holders of at least one-half of the then unpaid bonds, might sell the same at public auction. Default was made in the payment of interest, but the trustee did not exercise his powers in the deed. The company issued their bonds and made their mortgages upon its property, and became indebted upon current expenses. The proceeds of the sales of the bonds having become insufficient to complete and operate the road, the president, on consultation with a large number of the bondholders, and by their advice, made other loans and applied the earnings in completing and operating the road, and meeting the most pressing claims. No mismanagement was shown. *Held:*

(1) Such an application of the income of the road was not a misapplication of the funds, but on the contrary greatly to the security of the bondholders.

(2) Although the trustee might have taken possession of the property, or have sold under the powers in his deed, he may waive this right and file a bill to foreclose.

3. The court of equity. its juridisction being thus invoked, will look into the facts and exercise an equitable discretion; it will not enforce the strict penalties of the deed.

4. The action of the officers of the company with the consent of the trustee and part of the bondholders in the expenditure of its income, will be respected and sustained so far at least as to relieve the company from any penalty or charge of misapplication of the funds of the road.

5. Under the circumstances of this case, ordered, that the officers of the company set aside one-half of the net earnings of the road for the payment of the interest on the bonded debt; the other half for the payment of the floating debt,

and a full monthly report be made to the court,—the complainant having the right to renew his application for the appointment of a receiver upon a new statement of facts.

In his bill, the plaintiff states that the defendant owns, and has in operation, a line of railroad, commencing at New Albany, on the Ohio river, extending thence to Michigan City, on Lake Michigan, two hundred and eighty-eight miles; also a branch of said road, not yet in operation, extending from Gosport, in Owen county, to Indianapolis, of the length of forty-three miles; that in connection with the road and branch, the company has in use a large amount of rolling stock, consisting of locomotive engines and cars of various descriptions; also various machine-shops for making and repairing engines, cars and machinery; also various other property necessary to equip said road for a successful operation, in the transportation of passengers and freights; with corporate powers to regulate the same, charge freight and passage money; which machinery in its operations is so combined as not to admit of a separation, on which account the complainant prays that the same may be sold or otherwise disposed of as an entirety, and in such manner that all of said corporate franchises may pass and vest in the purchaser or purchasers, as a body corporate.

The complainant further states that the said company, on the eighth day of February, 1851, being engaged in constructing that part of its railroad which lies between New Albany and Gosport, one hundred and twelve and seventy-one one hundredth miles, and being in need of money to build the road and properly equip it, resolved to borrow five hundred thousand dollars, to be secured by certain bonds, of one thousand dollars each, payable semi-annually in the city of New York, at ten per cent. per annum, subject to a clause that the holders thereof should have the right to exchange them at par for stock; that, to secure the payment of said bonds, a deed of trust was executed, which the complainant holds, whereby the company granted, bargained and sold to the complainant and his successors in the trust created, all the following then

present, and then in the future to be acquired property of said company, pertaining to that part of the road which lies between New Albany and Gosport, to wit: the road made and to be made, including the right of way, and every description of property which pertained to the road, and which the company might acquire, on the following trusts.

If the company should fail to pay the principal or any part thereof, or the interest or any part thereof on the bonds when the same might become due, when demanded, then, after sixty days from such default, upon request of the holder of such bond, the complainant or his successor in the trust, should enter into and take possession of all and every part of said premises and property, and as the attorney in fact or agent of the company, by himself and agents or substitutes duly constituted, have and employ the same in making all needful repairs, alterations, and additions thereto; and after deducting expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid; or the complainant, his successors in said trust, at his or their direction, might on the written request of the holders of at least one-half of the bonds then unpaid and unconverted into stock, cause the same premises, or so much thereof as should be necessary to pay the principal and interest of all the bonds then unpaid, to be sold at public auction in the city of New Albany, in the State of Indiana, or in the city of New York, giving at least forty days notice, &c. The bonds were duly executed, and the money loaned on the faith of the security, &c.

And the complainant says that the company paid the interest which became due prior to the 1st of February, 1857. That the interest which became due on that day, they failed to pay, and that the whole of the coupons for the installment of interest which fell due on that day are unpaid, amounting to the aggregate sum of twenty-five thousand dollars, more than sixty days after the maturity of said coupons having transpired. After this, the holders of a large number of said bonds required the complainant, as trustee, to enter upon and take

possession of said mortgaged premises; and other holders of said bonds, to an amount exceeding one-half thereof, requested the complainant in writing, to proceed according to the terms and conditions of said deed of trust, to make sale of the mortgaged premises, But he deemed it inexpedient so to do.

And the bill states, that several other loans were made of large amounts, at different rates of interest, by issuing and selling bonds, secured by deeds of trust on the property of the road on the same conditions as those specified in the first mortgage. On all of which subsequent loans the interest has become due and remains unpaid. He has not entered upon the property as above requested, to sell the same as authorized by the deeds of trust, because he says the company is much embarrassed in its affairs, being largely insolvent and owing a large floating, unsecured debt. That many of that class of creditors have prosecuted suits and judgments against the company, and are seeking to enforce satisfaction by the seizure and sale of the property on the road, &c.

That by reason of the premises, it is indispensably necessary to sell and dispose of said mortgaged premises, to the end that the proceeds may be applied as contemplated by all the deeds of trust.

All interest due prior to the 1st of February 1857, has been paid; but that which became due on that date has not been paid, and for this default the bill was filed.

Messrs. Stanberry, Ketchum & Lane, for complainant.

Messrs. Smith, Crawford & McDonald, for defendant.

McLean, J.—It is objected that as the complainant, under the trust deed, has power to take possession of the property, this proceeding in chancery is unnecessary and ought not to be sustained.

If this exercise of power under the deed be admitted, it is not perceived that it may not be waived.

To strengthen the application for a receiver, the affidavits of Mr. Lane, the counsel, and Mr. Williamson, the trustee, are filed, and the last report of the Railroad Company.

Mr. Lane states, that he lately visited New Albany in Indiana, where the principal office of the company is established, and he found the financial condition of the company exceedingly poor; that the laborers on the road had not been paid their wages for a long time, and that there had been a strike, &c., and he proposed to the company that the laborers should be paid out of the first net earnings; and that the property of the road should be given up to the trustee, &c., but the president of the company rejected the proposal.

The affidavit of the complainant corroborates, in some degree, the facts stated by Mr. Lane, in regard to the embarrassed condition of the company, founded upon the representations made to him; he says that the interest has not been paid, as alleged in the bill; and that the bill is true. And he says that the company, in his opinion, are by no means able to pay the amounts due and to fall due on their various issues of bonds; that the property of the company is jeoparded by a large and constantly increasing floating debt; and that a very large number of those holding bonds of the company, issued under the various mortgages, of which this deponent is trustee, have served on him a written request according to the conditions of the mortgages, requiring him to cause the said road and its various appurtenances to be sold according to the terms of the mortgage. In the deed of trust it was required that at "the written request of the holders of at least one-half of the bonds then unpaid, he shall cause the premises to be sold." The words used in the above affidavit are not equivalent to the requirement of the deed. But the bill alleges, in the words of the deed, that the request was made, by at least one-half of the bond-holders, and the complainant swears to the truth of the bill.

James Brooks, president of the Railroad Company, filed an affidavit which admits the execution of the mortgages, and the issue of the bonds as stated by the complainant; but he says the proceeds of the sale of the bonds, the stock subscriptions and other means of said company, were insufficient to finish and equip the road for business; and it became necessary to

have other means to finish the road, and put it in such condition as would enable the managers to earn the necessary amount of money to pay the principal and interest of its debt.

At that time the railroad securities had got in such bad repute, that it was impossible to borrow on the sale of bonds, except at such a sacrifice as would be ruinous to the company. The company was reduced to the alternative of abandoning the road in an unfinished state, which would have caused an almost total sacrifice to the bond-holders, or to state the difficulty frankly to such of the bond-holders as could be seen, and go on and use the net earnings of the road with such other means as the company could command, and finish and equip it.

He further says that he saw a large number of the bond-holders from time to time, in his visits to New York, and with whom he was in correspondence, who were fully advised of these difficulties; and they uniformly advised him to go on by all means and finish the road, and relay the flat bar track in good order for running, so as to pay the debts of the company. The deponent believes, and the complainant and bond-holders expressed to him the belief that, but for an unlooked for loss, by the failure of the crops of 1854 and 1856, the road could not only have been finished and put in good order, but the floating debt paid off, and the interest paid on the bonds.

He denies that there has been the misapplication of a dollar of the funds of the road.

There are some judgments against the road for claims of damages for right of way, where the parties refused to abide by the awards made; but with the exception of this class of claims, there are few, if any, judgments against the company; and there never has been two hundred dollars worth of property of the road sold on execution. The net earnings of the road for the present year have been expended in paying for labor and materials, and in constructing and operating said road, and repayment of money thus expended.

He says and believes, that the road and appurtenances are more than sufficient to pay all of its debts, and that the secur-

ity in the bonds has been increased nearly fifty per cent. since the first three millions of its bonds were negotiated. The deponent states that many of the bond-holderes and others competent to judge, who have examined the work, expressed the opinion that more work had been done, in the construction of this road, than on any other road for the amount of money.

The United States engineers and the engineers of the state of Indiana estimated the cost of this road from New Albany to Crawfordsville, a distance of one hundred and sixty miles, at sixteen millions of dollars, which has been built by the company for less than five millions. And the entire road from New Albany to Michigan City, two hundred and eighty-eight miles, has been constructed for about seven and a half millions of dollars.

The managers of the road felt safe in assuring the laborers on it that they would be paid, as the work was not only done with the knowledge, but at the repeated and urgent request of the complainant, as well as a large number of the bond-holders, with whom deponent from time to time came in contact.

The floating debt of the company on the 1st of October, 1857, was about the sum of $235,000; which shows a reduction of $45,000 since the 1st of July last.

In the year 1855, the net earnings of the road amounted to the sum of $372,402.25. This paid $315,256.59, the interest on bonds, and left a surplus of $56,125.36. The gross earnings of the six months preceding the 1st of January, 1857, amounted to the sum of $413,666.66, which left a balance, after deducting all expenses during the same time, of $190,531.70.

The gross earnings of the road ending June 30, 1857, amounted to the sum of $686,818.72, which, after deducting the expenditure for the same time, left the net earnings $268,090.95; and this, the president of the road says is $200,000 less than the sum estimated, which was caused by the failure of all the great staples of the country in the year 1856, reducing the amount of transportation, as is supposed, to that amount.

The interest now due is about $273,000, which sum, together

with the floating debt, and the accruing interest, may be provided for and paid, under prosperous circumstances, in a reasonably short time. After the payment of the floating debt, it is not doubted that the accruing interest will be punctually discharged, if no untoward circumstance should occur.

The case made in the bill is, the failure to pay the interest on the bonds in February last, and the embarrassed condition of the railroad company.

It seems to be considered that a receiver will be appointed, as a matter of course, under the mortgage where a default has occurred in the payment of any part of the interest or principal. If this be so, the chancellor, in such a case, can exercise no discretion. He can do nothing less than carry into effect the conditions of the bond.

It is not the province of chancery to enforce penalties, but to relieve against them. It is asked, may the court disregard the contract of the parties? Certainly not. But where there is a hard and an unconscionable contract, a court of equity will withhold its aid, and leave the party to his remedy at law. An individual promises to pay on a certain day, a thousand dollars, and, in default thereof, to pay two thousand. Would not a court of chancery relieve from this penalty? And the payment of the penalty is the contract of the party. What penalty could be more disproportionate to the default, than the one under consideration? A failure to pay any part of the installment of interest, subjects the company to the immediate payment of several millions of dollars, not payable except under the default for many years; and the same default subjects property to the amount of several millions to a sale at auction, on a short notice.

The appointment of a receiver, when directed, is made for the benefit of all the parties interested, and not for the benefit of the plaintiff, or of one defendant only.[1] It is a matter resting in the sound discretion of the court.

In such cases courts of equity will pay a just respect to such legal and equitable rights and interests of the possessor of the

[1] 2 Story's Equity Jurisprudence §829.

fund, and will not withdraw it from him by the appointment of a receiver unless the facts averred and established in proof show that there has been an abuse or a danger of abuse on his part. For the rule of such courts is not to displace a *bona fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference.[1]

It is true the parties in the contract, under consideration, agreed that a default in the payment of any part of the interest or principal, when payable and demanded, should incur the penalty sought to be enforced. Yet, when the aid of a court of equity is invoked it will look into the facts and exercise an equitable discretion. And if the party claims and attempts to exercise the powers given him in the contract, which, under the circumstances, are unjust and ruinous, he may be enjoined.

Has there been any abuse of their powers, or a misapplication of their funds by this company, which authorizes the appointment of a receiver?

This step is to be taken by the bill, with the view of selling the entire road, and all its appurtenances, for the benefit of the bondholders.

The interest due in February last has not been paid, and since that time another installment of interest has become due, which has not been paid. All previously accruing installments of interest were paid or satisfactorily arranged. And the late large outlay for the completion of the road and its equipment, was not only approved by the complainant and many of the bondholders, but they urged the president of the company to go on with the work by all means, and finish and equip the road, so as to increase the revenue, and they agreed to receive bonds in payment of the interest then due.

Under the influence of this encouragement it seems the company prosecuted the work and completed the road, which is now in successful operation. In this way, as appears from the affidavits, was every dollar of the floating debt, complained of, created. It went to increase the securities of the bond-

[1]Tyson *vs.* Faircloth, 2 Simon and Stuart, 141; 2 Story's Equity Jurisprudence §835.

holders by adding to the value of the road, and increasing the tolls for the payment of the interest and principal. But this is now insisted on as a misapplication of the funds of the road, which not only authorizes, but requires the appointment of a receiver.

But this does not, in my judgment, evince bad faith on the part of the company, but, on the contrary, showed a laudable desire to save the bond-holders and all the parties interested, from loss.

Had the road been in the hands of a receiver, no chancellor fit to deal with these subjects, it appears to me, could have hesitated to order the receiver to do, in this respect, what the company has done. In the deed of trust it is specially provided that the trustee, if he take possession of the road, shall make repairs, additions, &c., and an offer is now made to pay this floating debt, so far, at least, as laborers are concerned, if the road be given up by the company. Whether the debt be due to laborers on the road or to others, is not material, seeing it was incurred under the urgent request of the trustee and several of the bond-holders, and for the preservation and life of the road.

When property is purchased and placed upon the road, no lien being taken by the seller, it becomes subject to the mortgage lien on the road, so that it is not liable to an execution, except under the mortgage; and existing liens on the road, under the mortgages, can only be adjusted by a court of equity.

But it is said, the complainant, and a part of the bond-holders, had no power to authorize the new expenditure in the completion of the road. Such an authority as was exercised will be respected and sustained by any chancellor, at least so far as to relieve the company from any penalty or charge of misapplication of the funds of the road.

By what authority does the complainant sue in this case and claim a right to have equities adjusted between parties who claim conflicting interests? But in a matter of this kind, so essential to the interests of the bond-holders, there can be no difficulty in sustaining the company, as above stated. But still the default is admitted, and the failure to pay occurred

under the circumstances stated; and the question now is whether this default requires the appointment of a receiver and a discontinuance of the agency which now controls the road; and this is to be done preparatory to the sale of the entire property of the road.

The bonds will not be due and payable for many years. They who made the loans looked to the interest, and the ultimate payment of the principal.

This procedure involves some fourteen or fifteen millions of property; the property of the railroad and of the bondholders. Care should be taken in this case, as in all others, to administer equity, without, if possible, a sacrifice of property.

From the exhibits in this case, there is a reasonable probability that, in the course of a short period, a vigorous operation of this road may enable its directors to pay the deferred interest and their floating debt; and the discharge of these will make the payment of the current interest on its bonds easy, out of the net profits.

If there were no other interests involved than that of the bond-holders, such a course is so strongly recommended, by equitable considerations, that no intelligent holder of such securities could object to it. The floating debt has accrued under circumstances which give a strong claim to the company for some indulgence in the payment of the deferred interest, seeing the completion has added so much value to the security of the bond-holders, and increased the profits of the road; and, especially, as the work was done on the recommendation of the complainant, and a part of the bondholders.

So far as the conduct of the company has been developed in this somewhat informal examination, it is entitled to the highest commendation for its firmness, energy and success, in the accomplishment of this great work.

There is a strong probability that, in a very short time, the road will be in a condition to meet its engagements under the mortgages, which is all the bond creditors have a right to demand.

No change of agency could increase, I am convinced, the

efficiency of that already employed on the road. A sale of the property would in all probability, sacrifice the stock of the road amounting to between two and three millions of dollars, and more than half if not two-thirds of the property of the bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right, enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so, under the facts above stated.

But I will afford to the bond-holders every reasonable assurance that can be required. I will admit an order to be entered that the motion of the complainant for the appointment of a receiver be denied, and that the said company, from and after the 1st day of January next, set aside one-half of the net earnings of the road, for the payment of the interest of the bonded debt of said company,—the other half to be applied to the payment of the floating debt of the company, a report of the gross and net earnings to be made to the court monthly by the secretary of the company; that is for the month of January, and at the close of the succeeding months, so soon as the returns can be received and made out, half of the net earnings to be paid into court for the bondholders. The company will report, also, in the court how the net earnings have been expended from the 1st of November to the 1st of January aforesaid.

But nothing in this order is to be understood as preventing the plaintiff from renewing his motion for a receiver at any time prior or subsequent to said 1st of January, upon any new statement of facts which he may be able to present.

The interest is payable on demand. If the bringing of the action be considered a sufficient demand, the coupons must be presented and filed, if payable to bearer, before payment will be ordered.

THE N. W. THOMAS.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—OCTOBER TERM, 1857.

IN ADMIRALTY

1. SALE UNDER STATE LAW.—Priority.—The sale of a vessel under a state statute does not divest a prior admiralty lien.

2. As between the purchaser at the marshal's sale, and the purchaser under the state court proceedings, the former has a good title, even though the proceedings in the state court may have been first instituted. The case is similar to that of a purchaser of land on execution, which is afterwards sold under a prior mortgage.

3. If a state should institute proceedings *in rem.*, unknown to the common law, which interfere with a rightful exercise of the admiralty law, it would be a violation of the Constitution and laws of the Union.

4. The statutes of Ohio and Missouri as to attachment of boats and vessels construed.

Appeal from the District Court.

The libel was filed in 1854 on a claim for services performed on the above boat.

The respondents in their answer say, that after the date of the alleged claim of the libellants, the steamboat N. W. Thomas was seized on a warrant issued from the Court of Common Pleas of Hamilton County, under a statute of the state, at the instance of material men, and on the 16th of February, 1854, sold by the sheriff to the claimants who claim to hold it free from all prior liens.

The district court overruled this defense, and decreed that the claim of the libellants was a lien upon the boat, and that it should be sold, &c.

The lien of the libellants was prior in date to that of the respondents..

T. D. Lincoln, for libellants.

The libellants have a lien upon the boat preferable to any other lien even in admiralty, and prior to a bottomry bond. *The Globe*, 13 Law Reporter, 488; Abbott on Shipping, 662; *The Favorite De Jersey*, 2 Robinson's Admiralty R., 232; *Pitman vs. Hooper*, 3 Sumner, 50, 286; *Taylor vs. Royal Saxon*, 1 Wallace, Jr., 311; *The Sydney Cove*, 2 Dodson,111; *Blaine vs. Ship Charles Carter*, 4 Cranch, 328.

The lien in admiralty is not lost by a sale or by a forfeiture or condemnation of the vessel to the government, and it is preferable even to bottomry bonds. *The Globe*, 13 Law Reporter, 491; Abbott on Shipping, 662; *United States vs. Wilder*, 3 Sumner, 308; *St. Jago De Cuba*, 9 Wheaton, 409; *The Sydney Cove*, 2 Dodson, 112; *Blaine vs. Ship Charles Carter*, 4 Cranch, 328; *Harmer vs. Bell*, 22 English Law and Equity, 64.

It being an admiralty lien, the state courts can take no jurisdiction of it, because the 9th section of the Judiciary Act gives the United States courts exclusive jurisdiction in all admiralty and maritime causes. 1 Stat. 76, 77; *Ashbrook vs. The Golden Gate*, 5 American Law Register, 154; *The Globe*, 13 Law Reporter, 488; *O'Callahan vs. Rigg*, 5 American Law Register, 139; *The Barque Chusan*, 2 Story, 464.

The Ohio law does not profess to enforce the admiralty lien, but proceeds to create new liens and liabilities, and to enforce them, entirely regardless of the admiralty preferences and priorities.

See 1st and 2d sections Swan's Statutes, p. 185, new edition; p. 209 old edition.

The lien when acquired by the Ohio law is inferior to the admiralty lien. *Dudley vs. The Superior*, 3 American Law Register, ex., 22; *Sexton vs. The Troy*, Ib.

Under this law it has been held that the court cannot enforce other maritime liens. *Goodsill vs. Brig St. Louis*, 16 Ohio, 178.

In none of the states do they enforce the lien laws of other states, as is done in admiralty courts. *Noble vs. The St. An-*

thony, 12 Missouri, 263; *Wight vs. Maxwell*, 4 Michigan, 44.

The party who first seizes the boat in the state courts is the first satisfied. *Jones vs. The Steamboat Commerce*, 14 Ohio, 412.

It was originally held to apply only to such cases as originated in the state. *The Steamboat Champion vs. Jantzen*, 16 Ohio, 91; *Goodsill vs. The Brig St. Louis*, 16 Ohio, 178.

These services having been earned out of this state, the law would not apply to them.

The amendatory act of 1848 extends it to causes arising out of the state, but it saves all *bona fide* purchasers. Swan's Statutes, page 187.

This is not the case as to admiralty liens: they hold even against *bona fide* purchasers, who have no notice of the claim, but as to all causes arising out of the state, as this cause did, the amendatory act prohibits the libellants from proceeding as against a *bona fide* purchaser without notice. This very act shows that it does not take, and does not profess to take, cognizance of admiralty liens, for it prohibits a recovery in such cases.

Since the amendatory law the lien has been held to be one remedial simply. *Thompson vs. The J. D. Morton*, 2 Ohio St. 26; *Hilliard vs. The Schooner Spring*, 10 Western Law Jurist; 85 *Barker vs. The Flag*, 1 Handy, 385. See also *Canal Boat Huron vs. Simmons*, 11 Ohio, 458; *Lewis vs. Schooner Cleveland*, 12 Ohio, 341.

It cannot therefore do more than to affect the rights of the owners, who bring her to the state, where only she can be seized under the act.

Indeed, none but the owners and their agents have any authority to appear in the cause. They are authorized to appear, and release the boat, receive the money, appeal, &c., and the judgment professes to bind them. Swan's Statutes, page 209.

It does not profess to bind any one else.

As a remedy, and as a lien, affecting merely the owners, when they appear it may be valid. Yet as a remedy it cannot take away the rights of any persons not made parties. *Green*

vs. Biddle, 8 Wheaton, 75; *Bronson vs. Kinzie*, 1 Howard, 311; *Arrowsmith vs. Burlingim*, 4 McLean, 495; *Norris vs. The City of Boston*, 4 Metcalf, 293; *Pierce vs. The State*, 13 New Hampshire, 536.

As the act provides for no monition nor for bringing other parties before the court, none but those actually before the court are bound by the proceedings under it, nor can their rights be affected; certainly none who claim under another and higher law. *The Globe*, 13 Law Reporter, 488; *The Mary*, 9 Cranch, 126; *Bradstreet vs. The Neptune Insurance Company*, 3 Sumner, 600.

Proceedings *in rem.* bind all the world only because monition issues, and all the world are made parties. *The Mary*, 9 Cranch, 126; *Bradstreet vs. The Neptune Insurance Company*, 3 Sumner, 600.

None are made parties here, and none have a right to appear except the owners and their agents.

In this respect see the case of *Germain vs. Steam Tug Indiana*, 11 Illinois, 535, which is a decision under a law identical with the Ohio law.

This principle has been carried still further in Ohio. The old attachment law of Ohio provided that the judgments should be personal judgments, and that the balance not satisfied by the property attached should be collected on execution, as in other cases. Sec. 11 Swan's Statutes, 92, old edition.

But the Supreme Court has held that no execution could be issued upon such for such balance, though the statute did authorize it. *Arndt vs. Arndt*, 15 Ohio, 33; *Pelton vs. Platner*, 13 Ohio, 209.

Under this statute no monition or notice is given, and each person proceeds separately, and for himself; a separate record and judgment are had in each case.

There are many cases where it has been held that such a sale does not deprive the libellants of their right thus to proceed. See *Taylor vs. The Royal Saxon*, 1 Wallace, Jr., 311; *Gallatin vs. The Pilot*, 2 Wallace, Jr., 592; *Wall vs. The Royal Saxon*, 2 American Law Register, 324; *Dudley vs. Steam-*

boat Superior, 3 American Law Register, 622; *Certain Logs of Mahogany*, 2 Sumner, 589.

It is the practice in the English admiralty to seize vessels under common law process. *The Flora*, 1 Haggard, 298.

Even the state courts of the different states have held that a public sale under this law does not cut off liens under these laws. *Wight et al vs. Maxwell*, 4 Michigan, 44; *Germain vs. Steam Tug Indiana*, 11 Illinois, 535; *Steamboat Seabird vs. Frances Behler*, 12 Massachusetts, 571; *Devinny vs. The Memphis*, 2 American Law Register, 656; *Read vs. Fawks*, 9 Porter, Alabama, 623.

That state laws cannot apply to this class of vessels or interfere with admiralty liens, see also *Smith vs. Steamer Eastern Railroad*, 1 Curtis, 253; *The Barque Chusan*, 2 Story, 464; *Dudley vs. Steamboat Superior*, 9 American Law Register, 630; *Sexton vs. Steamer Troy*, Ib.

Mr. Coffin, for respondents.

McLean, J.—The Constitution of the United States declares that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction," and the Judiciary Act of 1789 provides that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[1]

The Supreme Court of the United States has decided that the admiralty jurisdiction extends over all navigable waters of the United States, where the commerce is carried on between two or more states. Over a commerce which is limited to any state, the jurisdiction of such state is exclusive. And so, over a commerce between two or more states, the admiralty jurisdiction of the United States, under the Constitution, is exclusive.

In the case of *The General Smith*, 4 Wheaton, 438, it was held by the Supreme Court, that the maritime lien did not ex-

[1] 1 United States Statutes at Large, 76.

tend to the home port of the vessel. In this decision the common law of England was followed, as appears from the argument of Mr. Pinckney, and the decision of the court. In that case the proceeding was *in rem.*, and not *in personam.* At the home port there is a maritime lien throughout Continental Europe under the civil law, the same as at a foreign port. But so strenuously was this principle opposed by the common law lawyers of England, with Coke at their head, that the admiralty law was not permitted to operate within the body of any county in England; and in the above case of *The General Smith*, the Supreme Court adopted the same rule, at least so far as the maritime lien is concerned.

The maritime lien for seamen's wages is as old as the sea laws, whether founded on the Rhodian laws, the laws of Oleron, the ordinances of France, or the famous laws of Wisbuy. This law, being a part of the maritime system, was adopted by our Constitution, and by the act of 1789 is declared to be exclusively of federal cognizance.

In an early period of our Government the Supreme Court held, "The decree of a court of admiralty *in rem.* is conclusive everywhere; and the grounds of such decree cannot be inquired into in any other admiralty court." [1] This decision was placed upon the fact that the whole world are parties in an admiralty court. Every person interested may make himself a party, and in all cases notice is given with this view.

By the steamboat law of Ohio, passed in 1840,[2] an action may be brought against a steamboat or other water craft, for any cause or ground of action; and the vessel may be seized, her apparel and furniture, and finally sold in satisfaction of the judgment. This law was amended in 1848, so as to authorize the procedure against the vessel though the cause of action may have arisen beyond the jurisdiction of the state, and though the boat may not have been navigating the waters of the state or those bordering upon it.

[1] Penhallow *et al vs.* Doane's Administrators, 3 Dallas, 54.

[2] Revised Statutes, Swan & Critchfield, Chap. 26, pp. 252,257.

Another amendment of this law was made in 1843; the first section of which seems to have been intended for some other purpose than that which is expressed. And in 1851 an act was passed requiring ten days notice to be given of the sale of a vessel, in a newspaper, in addition to the notice required in the preceding acts. In the preceding acts no notice of such sale is required, unless it be found in providing that execution shall issue according to the usual rules of such proceedings.

Under this law the steamboat in question was sold, and the purchasers claim to hold it exempt from the lien of seamen's wages of prior date.

The seamen's lien for wages is favored in the admiralty, and takes precedence over all other liens. The sailor is considered as a part of the ship, as indispensable to its movement as any part of its equipment.

Suppose the Legislature of Ohio had provided that no maritime lien should be recognized within the state, could any one doubt that such an act would have been unconstitutional and void? This, perhaps, may be admitted, and the argument might still be urged, that a prior maritime lien may be barred by the subsequent sale of the vessel on a junior lien under the Ohio statute.

A case is cited of high authority lately decided in Louisiana, on the point before the court. It was held by Mr. Justice Campbell, in the case of *Anthony et al vs. The Steamer Atlantic*, that the prior maritime lien of the libellants, who lived in New Orleans, was extinguished by a sale of the vessel at St. Louis, in Missouri, under a law of that state, it being the port where the vessel was registered, and consequently its home port.

That case may not be accurately reported, or was not, perhaps, fully presented by the counsel. I am quite sure that if the learned judge had had before him the Missouri statute, and the decisions on that statute by the Supreme Court of Missouri, he would have come to a different conclusion. The act of Missouri expressly provides, "the effect of a sale under the statute, shall be to discharge all other liens and incumbrances,

under this act." This clearly imports that the act could only be applied in discharge of liens arising in the state of Missouri, and under the same act. It could, therefore, have no application to a prior maritime lien, arising in a foreign port; and this was the character of the lien claimed at New Orleans.

I am confirmed in this construction of the Missouri act, from the fact that it has so been construed by the Supreme Court of the state. The court held, "The Missouri statute concerning boats and vessels, is limited in its provisions to contracts made within the state, with boats used in navigating the waters of the state." No claim arising out of the state could, therefore, come under the act.

In addition to the above, the able district judge of the United States for Missouri, in the case of *Harris et al. vs. The Steamboat Henrietta*, 1 Newberry, 284, held, that a sale of the vessel under the Missouri statute, did not displace a prior maritime lien for supplies.

By an act of Congress of the 19th of May, 1822, it is provided, "That proceedings in the courts of admiralty and maritime jurisdiction shall be according to the principles, rules and usages, which belong to courts of admiralty, &c.,"[1] and this being within the Constitution, is the supreme law of the land.

I have stated the saving clause in the act of 1789, which makes the admiralty jurisdiction of the district court exclusive "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it."

Is the procedure under the Ohio Statute, a common law remedy? In *Wight et al. vs. Maxwell et al.*, 4 Michigan, 44, the Supreme Court of Michigan held that the procedure under the Ohio statute, was not a proceeding *in rem*.

I have read the Ohio statute with some care, and I find no provision for other creditors to appear, and make themselves parties to the suit. The ordinary notice of a sale of property on execution, under other laws, and a notice of ten days, required to be given in a newspaper by the last amendatory law,

[1] 4 Statutes at Large, 278.

are the only provisions in the act as to notice.

In *Bradstreet vs. Neptune Insurance Company*, 3 Sumner, 607, Judge Story says: "It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned. If a person have not such opportunity, and yet is deprived of his rights, the proceedings are not judicial, but arbitrary, and ought to have no intrinsic credit given to them, either for their justice or truth."

Chief Justice Marshall says, in *Rankin vs. Scott*, 12 Wheaton, 177: "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity, to a subsequent claimant."

In the Eastern District of Pennsylvania, the *Royal Saxon*,[1] a steamboat, had been attached out of the Supreme Court of the state, eight days before she was libelled in admiralty by material men. The marshal made a special return, that he found the sheriff on board. The district judge took jurisdiction of the case and condemned the vessel, and ordered her to be sold, though this proceeding was opposed by the attaching creditors. The purchaser's title, under the marshal's sale, was held to be good by the district judge; and on an appeal to the circuit court, his judgment was affirmed. Judge Grier, on the appeal said, "that Taylor's title, who purchased under the marshal, is good against all the world, will hardly admit of a doubt; and as between him and the sheriff's vendee, the latter's title is as completely divested as if he had bought land on execution which was afterwards sold on a mortgage, which was the oldest lien on the property."

That case was before the Supreme Court at the last term. The only difficulty in the mind of any judge was, whether, as the process from the state court was first served, the process in admiralty could be interposed, before the final action in that

[1] 2 American Law Register, 324.

court. The maritime lien was prior in date, and no judge doubted that it was of paramount obligation to the local lien.

In a case before the Circuit Court of this Circuit, at Detroit, a libel was filed and process served on a vessel, not known to have been previously attached under the local law of Michigan, but the sheriff and marshal agreed they would hold a common possession for all concerned. The vessel was condemned and sold under the local law; and on the same day, but after the sale under the Michigan act, she was sold by the marshal under a decree in the admiralty. The admiralty lien was prior in date, and, on appeal, I held the right of the purchaser paramount to the purchaser under the sheriff's sale. The only doubt I felt in that case was, as to the legal right of the marshal to attach the property, it having been attached by the sheriff. Some effect was given to the arrangement between the attaching officers. In *The Barque Chusan*, 2 Story, 455, Judge Story held, that a state could pass no law affecting the maritime lien.

The admiralty law prevails in all commercial countries. It has been formed by the experience of many centuries, from the necessity and convenience of commerce, under the lead of the most eminent jurisconsults of the civil law for ages, and it is most admirably adapted to maintain and advance the growing interests of our commerce. Already it is practically extended to all our internal navigable waters, on which floats a commerce annually exceeding in value ten hundred millions of dollars, and this immense property, in its transit, is protected and regulated by the long established rules of the admiralty; and the question is, shall this system be impaired, and its uniformity and efficiency broken down by the legislation of the different states, influenced by local interests?

If a state shall institute a proceeding *in rem.*, unknown to the common law, which shall interfere with a rightful exercise of the admiralty law, it would be a violation of the Constitution and laws of the Union. Each state has the exclusive regulation of its own commerce, and in regard to liens, the home ports of its vessels; and beyond these, the common law reme-

dies remain unrestricted. Every one who deals with a ship, or purchases it, should be careful to be informed as to prior liens. From their nature they constitute a mortgage on the vessel, which is a wanderer, whether it plies in our own country or in foreign countries, and the credit given to it, in the form of bottomry bonds or otherwise, is often essential to its prosperous voyages. On the certainty of these liens much depends. A sale or transfer of the vessel by the owner, or a subsequent creditor, under the forms of law, will not displace them. Even a condemnation of the vessel by the Government does not defeat the lien for seamen's wages. I affirm the decree of the district court, with costs.

See Ashbrook *vs.* The Golden Gate, 5 American Law Register, (O. S.) p. 148; Foster *vs.* Steamboat Pilot, 1 American Law Register, (O. S.) p. 403; Hill & Conn *vs.* The Golden Gate, 6 American Law Register, (O. S.) p. 273; The Gazelle, Sprague 378; The John Richards, *ante p.* 106; The Circassian, 1 Benedict, 128; also The Propeller Skylark, decided by Drummond J., Northern District of Illinois, February Term, 1870, to appear in subsequent volume of these Reports.

The lien of a seaman who is also part owner, is, however, discharged. Gallatin & Wood *vs.* The Pilot, 2 Wallace Jr., 592.

It is held in The Sailor Prince, 1 Benedict, 234, that an attachment from a state court levied upon a vessel and her freight money would not prevent the district court from taking jurisdiction to enforce seamen's wages.

The questions decided in this case are also thoroughly considered in Taylor *et al. vs.* Carryl, 20 Howard, 583.—[*Reporter.*

THE B. S. SHEPPARD.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER TERM, 1857.

IN ADMIRALTY.

1. CANAL BOATS IN CHICAGO RIVER.—In navigating the Chicago River, canal boats are not, except under special circumstances, bound by the rule that applies to vessels, which is—they must have a boat astern with a line ready to be thrown ashore in case of emergency.

2. VESSELS APPROACHING BENDS—HEADWAY.—Where a barque in tow of a tug is approaching a bend in the river, where it is narrow, and vessels are lying at the side, extreme caution should be used, and it matters not that at the time of the collision her motion was moderate, if, from a want of care immediately before, it was out of her power to check her headway at the proper time.

The barque should have had her anchor where it could be let go at once.

3. CITY ORDINANCES.—This court is not in all cases bound by the city ordinances regulating navigation.

The facts are stated in the opinion.

Clarkson & Tree, for libellant.

Hooper & Clement, for respondent.

DRUMMOND, J.—On the 16th of September, 1856, the canal boat Buffalo, in company with several other canal boats, two abreast, was coming down the south branch of the Chicago river, on her way from Bridgeport to this city, in tow of the steam tug Hiram Warner. The canal boat was loaded with oats and corn, and was owned by the libellant. It was between eight and ten o'clock in the morning, and the tug, with its tow, was proceeding at a moderate rate, keeping close to the right bank of the river, and not far from Polk street bridge. The barque B. S. Sheppard was going up the river in tow of

the tug Walter M'Queen. Near the place where they met there is a bend in the river, the South Branch sweeping round somewhat to the west in its course to the lake. It will be seen therefore, that a tug proceeding up the river with a tow hugging the left bank of the stream at that point, would naturally head-reach across the river towards the right bank in turning the bend, and the tendency would be in proportion to the speed of the vessel. This is what actually occurred in the case before the court. The barque did not seem to be under perfect command, or from some cause, she headed too much towards the east, and came in collision with the Buffalo, and with her anchor knocked a hole in the larboard bow of the canal boat, doing considerable damage to the hull and cargo; for which the libel is filed. The Buffalo was next to the Hiram Warner, and as the danger of the collision became imminent, word was passed to those on the barque to let go the anchor. This, however, was not attended to, and, as already stated, the collision took place. The anchor of the barque was hanging from the cat-head on her larboard bow, by the ring-stopper, with the flukes in the water. It had been previously slacked down, but was not, in fact, let go until after it had struck and fastened into the canal boat, when its weight carried it to the bottom. The river at the place of collision is quite narrow, and there was, besides, a vessel lying on each side moored to the dock. A short time before the collision, the barque had a stern line out, fastened ashore, and was in the act of checking her speed at the time; and the weight of the evidence seems to be, that at the moment of actual collision her motion was inconsiderable.

The first question is, was there any fault on the part of the Buffalo or on the part of the tug that had her in tow? After an attentive consideration of the evidence, the court cannot say there was. The speed of the Hiram Warner, with its tow seems not to have been unusual or improper. They were well over to the right bank of the river. The only complaint made is that the canal boats ought to have had their lines out as the barque had, and it is insisted if this had been done no collision

would have taken place, and such appears to be the opinion of some of the defendant's witnesses. But we must not lose sight of the distinction between a canal boat and a barque like the B. S. Sheppard. This court has already frequently ruled that when a vessel is passing up or down the Chicago river, whether in tow of a tug or not, a boat astern with a line ready to be thrown ashore in case of emergency, is a proper and necessary precaution. The court has no doubt of the soundness of this rule; it is a salutary and practicable one with vessels which are and shall be provided with boats. Canal boats are different; they are not usually attended by row-boats, and it would in the nature of things be impossible that they should always be able to meet such a requisition. The court does not intend to intimate but that there may be circumstances where it would be a fault for a canal boat not to throw out a checking line to arrest its way That is to be determined when the case arises. In this case, I do not consider that those on the canal boat were bound, under the facts as established, to have lines astern. I do not well see how it could have been availing to prevent the collision; that is, there was no sufficient time, with the means at the disposal of the canal boat, after the collision seemed probable, to accomplish the object proposed—that of checking with a line astern. It is to be observed that it was but a moment, as it were, that they could count on, and the thing to be determined is whether they did all they could at the particular juncture to avoid the collision with the barque. On the whole, I cannot say that they could have prevented it at the time; nor do they appear to have done any act immediately preceding which tended to bring about the collision.

With the barque it was different.

The evidence is of course conflicting. To those on board of the barque it was the canal boat that run against their anchor and into their vessel. The passion and excitement of the moment give form and color to the statement of each witness. It is only by taking some leading facts, and by placing ourselves as cool spectators in the midst of so much confusion, that we

can judge fairly of the event. How much reliance is to be placed upon the account of this or that witness as to what occurred in the great tumult, need not be determined. There are some facts which are free from doubt. The B. S. Sheppard with its tug was approaching a turn in the river; the river itself was there quite narrow; a vessel was lying on each side; it was at a time when they were likely to meet vessels coming down. It is manifest, under these circumstances, extreme caution should have been used. If, as is stated by some of defendant's witnesses, it was impracticable for the two tows to pass at that point without coming in contact, the greater the necessity for caution and vigilance. Now it may be conceded that on the instant before the actual collision the barque was not moving at too rapid a rate, but I think it clear that in approaching the bend her speed was too great under the circumstances. The result was, in attempting to turn she had so much headway on her that with all their efforts, aided by a line fastened ashore, she would not mind her helm quick enough, and in the language of some of the witnesses, she head-reached across the stream and thus caused the collision. That this was the fact is made the more apparent from the circumstance that the fellow of the Buffalo sheered over to the starboard side of the barque, the latter in her progress dividing. as it were, the two canal boats which were towing abreast. It matters not that the motion of the barque was moderate at the time, provided, by a want of care immediately prior to the collision,—as for example, by too much headway,—it was out of their power to check their vessel at the proper time. No doubt as soon as they saw the probability of a collision they did all that they could to avoid it, but the fault consisted in their putting themselves in such a condition they could not soon enough stop their vessel. The error, therefore, I think, on the part of the Sheppard and of her tug, was in not using the needful precaution in approaching the bend of the river.

Again, there was a serious fault on the part of the barque in relation to the anchor. I had occasion fully to consider this

point in the case of *The Palmetto*,[1] decided about a year since in this court. It is true the facts in that case were somewhat different. There the vessel was lying at the wharf discharging her cargo, and while there the collison took place; but the main ground upon which the Palmetto was held to be in fault in that case, was because the anchor was not out of the way. No doubt the case is much stronger against a vessel at the wharf when the anchor is permitted to remain where it may strike a passing vessel, because when the craft is in motion it may be right and proper for the anchor to be in such a position that it can be let go on the instant. It is said that the ordinance of the city required the anchor of the Sheppard to be hanging at the forefoot. I do not consider myself bound in all cases by the city ordinances as to these matters. If the anchor was in a proper place and the proper conduct had been observed in relation to it, I should not, in this respect, hold the barque responsible, because technically it had not complied with the ordinance as to the anchor. The B. S. Sheppard had her anchor at the cat-head. The ordinance requires it to be dropped under the forefoot. There was therefore a clear violation of the ordinance, even if we take the opinion of one of the witnesses, that the anchor is under the forefoot when it is suspended from the ring stopper at the cat-head, a foot or two from the bottom of the vessel. However this may be, it is clear the anchor should be where it can be let go without delay. If this had been done in this case, most, if not all, the injury and damage would have been avoided. They let go the anchor after it had struck the canal boat; but then, as one of the witnesses told them, and the same one who had shouted to them to drop their anchor, it was too late; the thing was done. The truth seems to be that there was the feeling on board of the B. S. Sheppard, so common on these occasions, that theirs was the stronger and heavier vessel, and they, at any rate, would not be likely to suffer. This feeling not unfrequently produces carelessness and indifference at the time, and it certainly should not be countenanced by courts of justice.

[1] *Ante* p. 140.

One objection made to the anchor hanging under the forefoot, or by a chain from the hawse-pipe, by the mate of the barque is, that if it had been suspended there it would have been likely to come in contact with something and thus endanger the vessel which bore it. And yet this same witness insists that the barque had no motion at the time, "not over two feet an hour." It is manifest that if an anchor is permitted to hang at the side of the vessel as it comes in contact with another, the risk of loss is immensely increased, and the only safe rule to adopt is to require it to be dropped out of harm's way, and if need be to the bottom, in all cases where it is practicable. Here it is clear it could and ought to have been done, and for not doing it the B. S. Sheppard was in fault.

I shall therefore pronounce a decree for the libellant for the amount of damage which has been proved together with costs.

Steamers navigating crowded harbors or channels, or entering ports in the dark or in fogs, are bound to move with the greatest care, and to keep themselves under a headway at all times controllable, and sometimes to stop entirely, and where it is night or misty, to wait till they can see. In all such cases they must conform strictly to the rules of navigation; the rule applied in various cases. The Corsica, 9 Wallace, 630; The Johnson, Id., 146; City of Paris, Id., 634; The Portsmouth, Id., 682; The Syracuse, Id., 672; The Suffolk County, Id., 651.

Those having no tows, bound to regard with care those having them. The Alleghany, Id., 522; The Syracuse, Id., 672.

If either one of two vessels colliding has departed from the rules of navigation established by Congress, it must show cause for such departure. The Corsica, 9 Wallace, 630.

As to duty of vessels in Chicago River, see also The Steam Tug Brothers, subsequent volume of these reports.

Where a vessel runs into another moored at a wharf, there is a presumption of negligence on her part. The Bridgeport, 7 Blatchford, 361; The Helen R. Cooper, Id., 378.—[*Reporter.*

UNITED STATES vs. JOHN EDDY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY TERM, 1858.

1. LETTER IN THE MAIL—WHO MAY OPEN IT.—A letter once placed in the postoffice is in the custody of the law, and no one except the writer and the person to whom it is directed, or some one authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents.

2. NOT OFFICERS.—Neither postmasters nor other officers have any authority to open it under the pretext that there might be something improper or even criminal therein.

3. LETTER OF CRIMINAL PROTECTED.—The letter of a criminal is under the full protection of the law.

The violation by a criminal of an agreement that the sheriff was to inspect all letters written by him before they left the jail, would not authorize the sheriff to open a letter after it was in the postoffice. Nothing but his consent in regard to that particular letter would so authorize him.

4. STATE LAWS EXCLUDED.—When a letter is placed in a postoffice it is within the legal custody of the officers or agents of the government, and while it so continues, the laws of the United States operate upon it to the exclusion of state laws.

Indictment under the 22d section of the Act of March 3d, 1825, (4 United States Statutes at Large, 109.) That section declares: "And if any person shall take any letter or packet not containing any article of value or evidence thereof, out of a postoffice, or shall open any letter or packet which shall have been in a postoffice, or in custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle or destroy any such mail, letter or packet, such offender upon conviction shall pay for every such offence a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months."

During the summer of 1857, a man by the name of White was arrested on a criminal charge and placed in the custody of

the defendant, who at the time was sheriff of McHenry county. While in jail, White expressed a desire to write to some of his friends, asking for assistance, which the defendant said he might do, but that he, the defendant, must have the inspection of all the letters. To this White assented.

Some time afterwards, White wrote a letter addressed to a person in Iowa, and gave it to a man who had called on him at the jail. The latter deposited it in the postoffice at Woodstock, and paid the postage, and the letter was duly stamped. The sheriff, being informed of this, went to the postoffice and called for the letter, and it was handed to him by the postmaster, for the reason, as he states, that he supposed that Mr. Eddy only wished to look at the direction. While the letter was thus in the defendant's possession, he opened it, read it, took a memorandum of its contents, resealed it, and returned it to the postmaster, who duly mailed it.

From all the facts in the case, it appeared that the defendant's motive in the act was to prevent the prisoner from having any improper communication with any one by means of the letter; and he seemed to suppose he had the right to do what he did.

DRUMMOND, J., instructed the jury as follows:

1. If the letter was in the postoffice in the usual way, and for the ordinary purpose for which letters are deposited, and it was opened by the defendant before its delivery to the person to whom it was addressed, with the design to pry into the business of White or ascertain his secrets, then the offence was complete.

2. When a letter is once placed in the postoffice, it is in the custody of the law, and no one except the writer or the persons to whom it is directed, or some person authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents.

3. Neither postmasters nor postoffice agents, nor officers of any kind or grade, have any authority to open letters while in the postoffice, under the pretext that there might be something improper, or even criminal, written therein.

4. The letter of a criminal, when once placed in the post-office, is just as much under the protection of the law, as the letter of the most honest man in the community.

5. Even if it was the agreement between White and the sheriff that the latter was to inspect all the letters written by the former before they left the jail, and White violated the agreement, still that would not authorize the sheriff to open the letter after it was in the post-office, in order to ascertain its contents. Nothing could authorize him, except the consent, expressed or implied, of White, to open the letter which was deposited in the office.

6. In this case the party who was under arrest was afterwards tried and acquitted of the charge for which he was in custody, and we are therefore to presume him innocent. But that makes no difference in the principle applicable to such a case as this. If he had been found guilty the rule would be the same.

7. There is no conflict between the laws of the United States and the laws of the state. A state officer having a prisoner in his custody may exercise a certain discretionary power over his written correspondence with others, so long as that correspondence is out of the jurisdiction or control of the post-office department, but when it is placed within the legal custody of the officers or agents of the department, and while it continues there, the laws of the United States operate on it, and not the laws of the state. In what has been said, the court refers of course to letters while in such custody and on deposit, or in transit to the places or persons addressed, which was true of this letter.

Verdict—Guilty.

The court being of opinion that the defendant had been only technically guilty, without criminal or wrongful intent, imposed a nominal penalty.

It is an offence against this section to open a letter which has been in the postoffice before delivery to the person to whom it is directed, though the letter is not sealed, and was not at the time in the lawful custody of any person, and even though it was written by the defendant himself. United States *vs.* Pond 2 Curtis, C. C., 265; see also The United States *vs.* Tanner, 6 McLean, 128; The United States *vs.* Parsons, 2 Blatchford, 104; The United States *vs.* Marselis, Id., 108.—[*Reporter.*

YORK BANK vs. ASBURY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—APRIL TERM, 1858.

1. FORGED INDORSEMENT—NO SUIT CAN BE BROUGHT UNDER.—One partner having given the firm note, and forged the name of the payee to procure its discount at bank, no suit can be maintained by the Bank under the assignment.

2. SUIT IN NAME OF PAYEE.—The Bank may, however, bring an action in the name of the payee for its benefit.

3. WHEN JUDGMENT A BAR.—A judgment in such action by a court having jurisdiction is a bar to any subsequent suit for the same cause of action; nor will any other than an appellate court inquire into the correctness of the judgment. The partner having authority to draw and negotiate the note, it cannot be said that the forged indorsement affects the rights of his co-partners.

4. CESTUI QUI TRUST BARRED.—The Bank having sued in the name of the indorsee for its use, is substantially a party, and is within the rules that the judgment of a court of competent jurisdiction is final between the parties, and a bar to a subsequent suit.

5. NOTE—WHEN USURIOUS.—The making a note payable at a place in which exchange sells at a premium does not constitute usury; nor does it render the note void in the hands of a bank whose charter prohibits the taking more than a certain rate of interest. An agreement that the difference of exchange should be added to the interest would be a device to cover usury, and render a note usurious; but on a note payable at such a place, without proof that such a note commanded a premium at the place where it was made, the court will not presume usury. The contingency of the rate of exchange at maturity of the note cannot be incorporated with the contract to make it usurious.

6. USURY NOT CONTINGENT.—A contract not usurious at the time it is entered into cannot become so by any future contingency. The corrupt intent must be apparent on the face of the contract, or rather it must contain all the elements to make it usurious.

This action is brought against the defendants Asbury and Pierce, as partners, the latter being a citizen of California, (on whom the process was not served) who are charged to be indebted to the plaintiff in the sum of five thousand dollars for money lent, paid, had and received, and due on account stated &c.

The defendants pleaded,

1st. The general issue of non-assumpsit.

2d. That the Bank was not a corporation.

3d. That Pierce and Asbury were partners, as cattle dealers, Pierce residing in Pennsylvania, and Asbury in Ohio; it being the business of the firm to buy cattle in the Western States and sell them in the East; that Pierce without the knowledge of Asbury made an agreement with the York Bank that it should discount a note for four thousand dollars, executed by Pierce, in the name of himself and Asbury, payable to Cyrus Milner, Jr., & Co., indorsed by the payees, and Samuel Milner and Amos Carter, in sixty days, and that when the note should come to maturity, being payable at the York Bank, another note for the same amount, payable at the Western Bank of Philadelphia, in ninety days, indorsed by the same parties, should be received in payment of it.

The first note was discounted, and when it became due the second note was made, without the knowledge of Asbury, signed by Pierce in the name of the firm, payable to Amos Carter, and indorsed by Cyrus Milner, Jr., & Co., and Samuel Milner. Pierce forged the name of Amos Carter, as indorser, and delivered the note to the bank, in payment of the former one.

The plea further states, that after the bank had knowledge of the forgery of the name of Carter, it brought a suit, in the name of Carter, for its own use, the payee, in the Court of Common Pleas for Madison county, Ohio, against the defendants Asbury and Pierce, the process not being served on Pierce, to which suit the defendants pleaded non-assumpsit; on which issue the jury found for the defendants, and a final judgment was thereon entered, which remains in full force. The pleadings in the case are set out substantially.

To this plea there is a demurrer filed.

Swan & Andrews, for plaintiff.

Mr. Wilcox, for defendants.

McLean, J.—This demurrer raises the question, whether the above judgment is a bar to the present action.

In support of the demurrer it is argued, the note was made by Asbury to Amos Carter, or order, and that the indorsement of Carter was forged, of which Asbury was not privy, and that the Court of Common Pleas held that Carter had neither paid anything for the note, nor indorsed it; that Asbury was not concluded by the felonious act of Pierce; that the bank was without remedy on the note against the firm.

It may be admitted that the bank could not claim under the forged indorsement, nor was the action brought in that form. Carter being the payee of the note, the action was brought in his name, as payee, for the benefit of the bank; and no sufficient reason is perceived why this was not properly done The bank received this note in payment of the first one discounted, of the same amount, which was a full consideration The forgery did not affect the drawers on the paper, nor the obligations they assumed. It was treated as a genuine note payable to Carter, for the benefit of the bank. And this was the true character of the note, before the indorsement, under the contract with the bank; and the indorsement being void, after the payment of the money, the bank held the note for its security and benefit. The facts stated in the plea are admitted by the demurrer.

The note was made payable to the order of Amos Carter, and without his indorsement the other indorsers, it is supposed, could not be held responsible; but the drawers of the note, who received the money for their own benefit, could be sued in the name of Carter for the use of the bank. The drawers promised to pay him or order; and it is averred that Carter well knew the suit was prosecuted, but made no objection to it Under the circumstances, the court would protect the bank in the use of his name, requiring it to indemnify him as to the costs.

If the Court of Common Pleas, of Madison county, erred in their decision, on any point, it was the duty of the bank to remove the case by appeal or writ of error to the Supreme Court,

and have the error corrected. Asbury it is said was not concluded by the felonious act of Pierce. This may be admitted; but as one of the partners, it is not disputed, that he had the right to draw the note and negotiate it; and although he was estopped from denying the indorsement of Carter, such indorsement, could, in no respect, affect the rights of Asbury.

If the maker of a note make it payable to a fictitious person, and puts it in circulation with the fictitious name written on it; or if he make it payable to a real person and forge the indorsement, or procure it to be done, and then put it in circulation, he is estopped from saying that it was not genuine.[1]

In England it has been held that a bill drawn payable to a fictitious payee is payable to bearer, and may be declared on as such in favor of a *bona fide* holder ignorant of the fact.[2]

Whether Carter had paid any thing or not for the bill, was a matter of no importance; as it was made to obtain money from the bank, and the suit was brought for its benefit.

But it is contended that the judgment in the Madison court of common pleas, is no bar to the action of the bank; as to constitute a bar, the former action must not only be for the same cause of action, but between the same parties. And it is insisted the action of Carter was on his title as indorser; the present action being for the money originally advanced by the bank to Pierce and Asbury.

The former action was not brought by Carter as indorser, but by the bank in his name as the payee of the note, for its benefit, the drawers having promised to pay him.

Whether the cause of action was the same in the former action as in the present, is matter of fact and law. The present action is brought on general counts for money, claiming five thousand dollars. The former action was brought on the note for four thousand dollars, signed by Pierce and Asbury. But the special plea in bar, states in detail the former action in the name of Carter, for the use of the bank, to be the same cause of action as the present, and this is admitted by the demurrer.

[1] Riley's Law Cases, 248; Meacher *vs.* Fort, 3 Hill, (S. C.,) 227.

[2] Chitty on Bills, 10 American Edition, 157.

And on this, the issue of law is raised, whether the facts stated in the plea constitute a bar to the present action.

The judgment of a court having jurisdiction of the case before it, is final between the litigant parties. And this is true whether the parties have used the proper vigilance or not to bring the entire equity before the court and jury. No defect of either party in this respect can avail him, under a plea in bar. If it be the same subject matter of controversy, if it was fully brought before the court and jury, or might have been so brought before them, the judgment is final. Negligence or want of knowledge in the management of the case by the counsel or party, will constitute no excuse. If, on such ground a judgment could be regarded as not final, it would destroy its effect and make litigation endless. Where injustice has been done, a motion for a new trial, appeal or writ of error, is the only corrective at law.

The suit brought by the bank in the name of Carter, for its benefit, as appears from the facts admitted in the special plea, brought into litigation the second note given to the bank by Pierce and Asbury, and which, on proof of the facts, entitled the bank to a recovery; nor can it be doubted that it was the same subject matter involved in the present suit. That such a trial and judgment is final between the parties is clearly shown by the authorities cited in the defendants' brief.[1]

The bank was substantially a party in the first suit. The suit was brought for its benefit and was under its control; and its right so to prosecute the suit would, if objected to, have been protected by the court. The bank was a party within the rule which requires a judgment to be between the same parties, to constitute a bar.[2] Where a suit is brought for the use of another, a second action cannot be sustained for the same cause.

[1] LeGuen *vs.* Gouverneur, 1 Johnson's Cases, 436; Baker *vs.* Rand, 13 Barbour, 152, 160; Lawrence *vs.* Hunt, 10 Wendell, 81; Wood *vs.* Jackson, 8 Id., 10; Ehle *vs.* Bingham, 7 Barbour, 494; Dunckle *vs.* Wiles, 6 Barbour, 515; Birckhead *vs.* Brown, 5 Sanford, 135; Miller *vs.* Manice, 6 Hill, 114; Rose *vs.* The Turnpike Company, 3 Watts, 46; Hughes *vs.* Blake, 1 Mason, 515; Greenleaf on Evidence, §§ §§ 522, 528.

[2] 1 Greenleaf on Evidence, 523; Tuttle *vs.* Wilson, 10 Ohio, 24.

The case of *McDonald vs. Raynor et al.*, 8 Johnson, 345, seems to have no application to the case under consideration. In that case the payee sued the maker of a note who pleaded that the payee had indorsed the note, and the indorsee sued the defendant, who defeated the suit on an objection to the assignment. This was pleaded in bar by the same defendant in a suit by the payee; but it was held, that a defect in the assignment, on which the assignee failed, did not bar the suit by the payee, which did not involve the assignment.

For the reasons assigned, the demurrer to this plea must be overruled.

The second special plea is usury. The bank is alleged to be located at the Town of York, in York county, Pennsylvania; that by the terms of its charter it is prohibited from taking more than at the rate of one-half of one per centum for thirty days upon a loan. And it is averred that for many years before the time of the loan, the rate of money exchange between the town of York and the city of Philadelphia, was and has been in favor of Philadelphia, and against the town of York, varying in amount from one-quarter of one per centum to one-half of one per centum; all which was known to the York bank; and that as a scheme and device for the unlawful taking of more than at the rate of one-half of one per centum, for thirty days, it was agreed by the bank to loan Asbury and Pierce, the sum of four thousand dollars; and for the forbearance of the loan, that they should give their note for the above sum, indorsed and payable at the bank in sixty days, reserving forty-two dollars of interest; and when that note matured the said Asbury and Pierce, as had been agreed, paid the bank by way of renewal of the same, the sum of sixty-two dollars in money, and gave another note for the sum of four thousand dollars, payable at the Western Bank of Philadelphia, in ninety days from date, which is the note on which the first suit was brought.

The usury as alleged in the plea, consists in agreeing to make the payment at the Philadelphia bank, the exchange on which was worth from one-quarter to one-half per centum, at the

York bank. The exchange here spoken of must mean on sight bills, and can have no reference to a bill payable in ninety days. It is not alleged that more than six per cent. was reserved as interest, but this difference of exchange being added to the interest reserved or paid, makes the usury, and was a device adopted for that purpose.

An agreement to pay the first note when due, in a note for the same amount payable at Philadelphia; or on the second discount to pay the note when due at the Philadelphia bank, does not constitute usury. It is true, the plea alleges a corrupt agreement for the loan, but from the facts stated, there was no such agreement. If the agreement had been, that the difference of exchange proved should be added to the interest, and the payment made at the York Bank, it would have been usurious, and a device to cover the usury. But on a transaction to pay in ninety days the amount at the Philadelphia bank, without showing that bills on that bank at ninety days, commanded a premium at York, the court will not presume usury. Such a contingency cannot be incorporated with the contract to pay, so as to make it usurious.

To constitute usury there must be a loan of money, and for the forbearance, a corrupt agreement to pay more than the legal rate of interest. In the case under consideration, there was a loan of money, but there was no agreement that more than the legal rate of interest should be paid. The payment was to be made at a bank in Philadelphia, on which at the York Bank, sight bills generally sold at from one-quarter to one-half per centum advance; but whether a bill would sell, at an advance payable in ninety days is not shown. A contract must be usurious at the time it is entered into, or it cannot become so, by any future contingency. The corrupt intent must be apparent on the face of the contract; or at least it must contain all the elements to make it usurious. It is believed that the books furnish no instance of a contract which might or might not become usurious, according to circumstances, at the time of payment.

The plea not only sets up the usury on the ground stated, but

it alleges that the charter prohibits the bank from receiving more than at the rate of six per centum, and that on this ground the contract is void. These two defenses united in the same plea make it double, and consequently bad on special demurrer. A general demurer only has been filed, on which no advantage can be taken of this defect in the plea. But, aside from this consideration, the want of sufficient averments to show the usury is fatal. It must appear that more than at the rate of six per cent. was charged in violation of the charter.

It may be a convenience to the debtor to pay the amount in Philadelphia, rather than at the York Bank. And a fair presumption arises that this would be the case with cattle dealers, who generally sell at the large cities.

The demurrer is sustained to the second special plea.

WETMORE vs. RICE.

CIRCUIT COURT.—EASTERN DISTRICT OF MICHIGAN.—JUNE TERM, 1858.

ORIGINAL JURISDICTION—MARSHAL'S BOND.

1. Under the act of April 10th, 1806, and on the general principle that where the courts of the United States have original jurisdiction, whether from the character of the claim, or the citizenship of the parties, they may entertain proceedings against the marshal and his sureties, the circuit courts have jurisdiction of suits on marshal's bonds without reference to the citizenship of the parties.

2. The cases where such jurisdiction may not be exercised, are exceptional.

3. After judgment has once been entered for the penalty, it remains as security for all persons injured by default of the marshal. Complaints may be made, damages assessed, and executions issued, until the whole penalty shall have been recovered.

This is an action brought against George W. Rice as marshal, and his sureties, for the penalty of twenty thousand dollars,

the penalty of the marshal's bond on the ground that he permitted a certain vessel, in his custody by legal process, to go a voyage up the lakes by reason of which she was lost in a storm, and the plaintiff failed to recover his claim against the vessel which had been attached at his instance.

The defendants demurred and assigned several grounds of demurrer.

1. That it does not appear that the court has jurisdiction, the parties not appearing to be citizens of different states.

The other grounds it is not necessary to mention.

Walker & Russell, for plaintiff.

The subject matter of the suit, and not tne citizenship of the parties, nor the amount in controversy, determines the jurisdiction, as in causes of admiralty and patents. 2 United States Statutes at Large, 373; Conkling's Treatise, 65; *Gwin vs. Breedlove*, 2 Howard, 29; *The United States vs. Myers*, 2 Brockenbrough, 516; *Gwin vs. Barton*, 6 Howard, 7.

The first and second sections of the act of April 10, 1806, speak of suits upon these marshal's bonds, evidently meaning in the federal courts—Congress does not undertake to confer jurisdiction upon state courts.

Before this statute these bonds, running to the United States, could be sued in the name of the United States in the federal courts,—the only effect of the statute of 1806, in this respect is to change the plaintiff, and authorize the party in interest to sue, the tribunals remaining the same.

Goodwin & Goodwin, for defendants.

McLean, J.—As the plaintiff and defendants are citizens of Michigan, there is no ground for jurisdiction from the citizenship of the parties. But it is contended that the jurisdiction may be maintained from the character of the case and the act of Congress, on the same principle as suits under the patent laws and in admiralty.

Jurisdiction is given exclusively in the district courts of the

United States in all cases of admiralty, and express provision is made by law for the exercise of jurisdiction in patent cases. But there is no such provision in regard to suits on marshal's bonds.

In the second section of the act of 1806, "relating to marshal's bonds for the faithful performance of his duties,"[1] it is provided, that any one injured by a breach of the condition of the bond may institute a suit upon it, in the name and for the sole use of such party; and thereupon to recover such damages as shall be legally assessed, with costs of suit, &c. And the third section declares that said bond, after a judgment, shall remain as a security for the benefit of any one injured by the misconduct of the marshal, and the same proceedings shall be had as above stated.

Such suits are required to be commenced within six years after the right of action shall have accrued.

The question of jurisdiction as raised in this case seems never to have been made or decided in the Supreme Court or in any of the circuit courts. The case of *Bispham vs. Taylor et al*, 2 McLean, 355, was founded upon a marshal's bond, but the question of jurisdiction was not made, and, of course in the report of the case, no reference was made to it. The inference that, as the citizenship of the parties was not noticed by the court, it was deemed unnecessary to be alleged, is not sustained, as it appears in the declaration there was an averment of the citizenship of the plaintiff which gave jurisdiction. And the same remark applies to the case of *Sperring vs. Taylor*, 2 McLean, 362, referred to in the same volume. Neither of these cases brought before the court the question of jurisdiction.

In the case of the *Postmaster-General vs. Early*, 12 Wheaton, 136, there was no point ruled which has a direct bearing on the question before us. In that case the court says, "the postmaster-general cannot sue in the federal courts under that part of the Constitution which gives jurisdiction to those courts, in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the

[1] 2 United States Statutes at Large, 372.

courts of the United States under the authority of an act of Congress, the constitutionality of which rests upon the admission that his suit is a case arising under a law of the United States." The act referred to is that of the 30th April, 1810, which authorizes the postmaster general to bring suit.

The case of *Gwin vs. Breedlove*, 2 Howard, 29, was a writ of error to revise the proceedings of the Circuit Court of the United States, in the state of Mississippi, against Gwin, as marshal of that state, under a statute of the state authorizing a procedure against sheriffs and their sureties, which had been adopted by the circuit court. The court sustained the summary proceedings, as incidental to the suit of *Breedlove vs. Gwin*, in which a judgment had been rendered. But the point did not come up in that case, whether a suit on the bond could have been sustained as an independent action by parties living within the state in which suit was brought.

In a dissenting opinion, Mr. Justice Daniel said that the marshal would also be liable upon his official bond, because the Judiciary Act confers a right of action thereon without restriction as to citizenship, on all persons who may be injured by a breach of the condition of that bond. But he remarks, if a further or different recourse is sought against the marshal, one which may be supposed to arise either from the inherent power of the court over its officer or its judgments, then it is presumed that those who seek such recourse must show their right as arising out of the character to sue in the federal courts; they must show themselves by regular averment to be citizens of a state other than that of him whom they seek to implead.

So far as regards any procedure against the marshal as an officer of the court, for a failure in the performance of his duty, whether under a rule of court or by attachment, there can be no doubt of the power of the court. But the proceeding under examination is by an action on the marshal's bond, with the view of making his sureties responsible. This action is founded, not on any default of the marshal, under process issued by this court, but by a proceeding in admiralty in the district court. It does not then arise as an incident to any action in this court.

It is an independent action in this court between citizens of the same state.

The argument *ab inconvenienti* is a strong one, but on such ground the jurisdiction of this court has never been exercised. It has often been held that the consent of parties cannot confer it, as it is a matter of law. The sureties who are sought to be made liable are strangers to the proceedings in admiralty, out of which this case has arisen. They have a right to be heard in their defense untrammeled by any previous proceeding, except the matters of record which show the delinquency of the marshal. He being the principal and a party to such proceeding, it is binding on his sureties.

The act of 1806[1] in relation to marshal's bonds, provides that suit may be brought thereon, and that the judgment shall remain as a security for others who may be injured by the acts of the marshal.

From these and other provisions in the act, it is argued that on a marshal's bond suit may be brought without reference to the citizenship of the parties as on a patent right or in admiralty. The jurisdiction is expressly given in both these cases under express provisions, whilst in regard to marshal's bonds there is no such provision.

It may be assumed that in all cases where the courts of the United States have original jurisdiction, whether from the character of the claim or the citizenship of the parties, there may be a procedure against the marshal and his sureties, so far as such procedure may be incident to the original suit. And as this view brings the marshal's bond generally within the jurisdiction of the court, the cases where such jurisdiction may not be exercised form an exception to the general rule, and for which no special provision is made.

I am inclined to believe that all cases may be brought under the provision of the 3d section of the act of 1806, which provides that the bond, after judgment shall remain as a security for others who shall be injured by breach of its condition, until the whole penalty shall have been recovered. Beyond

[1] 2 U.S. Statutes at Large, 372.

this the sureties are not responsible, but the marshal is bound on common law principles.

A judgment having been rendered for the amount of the penalty, it stands as a security to all who may be injured by the default of the marshal. Complaints may be made subsequent to the judgment in proper form, and the amounts being ascertained on issues made to the court or jury, executions may be ordered until the penalty shall be exhausted. In this form every case may be legally embraced, with little expense, and speedily.

THE BARNEY EATON.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—OCTOBER TERM, 1858.

IN ADMIRALTY.

SALVAGE.

1. WHO ENTITLED TO—PRIOR TO OTHER LIENS.—Where the owners of a stranded vessel have abandoned all efforts to save her, and at their request a third party, at his own risk and expense, gets her off and repairs her, his claim is in the nature of salvage, and takes precedence of prior maritime liens.

2. MORTGAGEE MAY CLAIM SALVAGE.—The fact that the salvor held a mortgage upon the vessel not due, the mortgagors being the owners and in possession, does not deprive him of this preference. He cannot be considered in the light of an owner.

The libellant built this schooner and afterwards sold her to Peter Weber and Edwin Churchill, taking a chattel mortgage for the principal portion of the purchase money, leaving the mortgagors, the purchasers, in possession. They ran the vessel during the season of 1857; and in the month of November of that year, she was stranded on the Michigan shore of Lake Michigan. The owners failed in an effort to get her afloat,

and so informed the libellant, who procured men and advanced funds in an effort to save her, and in the month of May following, he brought her to the port of Milwaukee. There she was repaired at his expense, with the consent of the owners, but soon afterwards libelled by several parties for debts contracted, for supplies during the time Weber and Churchill were sailing her. This libel is subsequent to those libels, and a preference is claimed out of the proceeds of sale for the expenses and services incurred in getting the vessel afloat, and bringing her to Milwaukee, and for putting her in order for service. When she lay on the Michigan shore she was valueless, and she was so badly damaged as to require a thorough repair, both of the hull and rigging.

The owners, Weber and Churchill, make no defense. The other libellants object to the demand of this libellant, on the ground that being mortgagee, he was protecting and securing his own interest, by getting the vessel afloat and repairing her. And also that he by virtue of his mortgage is to be viewed in the light of an owner.

Emmons, VanDyke & Hamilton, for libellant.

Butler, Buttrick & Cottrell, for respondents.

MILLER, J.—The questions are,

1st. Whether the nature of the demand is such as to give this libellant a preference.

2. Whether the fact of the mortgage to him defeats his claiming a lien on the vessel.

The vessel was abandoned by the owners after they had failed in getting her afloat, and after they had exhausted their means in the effort. At their instance the libellant succeeded, after a large expenditure of money and labor. When she lay on the Michigan shore of the lake, in her broken and wrecked condition, she was probably not worth the demands of those prior libellants. At all events they did not attempt to make their money out of her by a sale, or make an effort to put her afloat by the expenditure of time, money, or labor. They lay by from

November, 1857, to this time, without making one effort to collect their debts, either from the owners or the master, or out of the vessel, until she has been got ready for service and made of value by the means and labor of this libellant. Now after she is brought to an accessible port, and restored to value equal to their demand, without any effort or merits on their part, they attempt to have appropriated the proceeds of her sale to their own demands. The demand of this libellant is for services in the nature of salvage service, and is entitled to a preference.

At the time the vessel was stranded, the owners, Weber and Churchill, were in possession. The libellant's mortgage was not then payable. He did not enter upon the work on his own account, but after the owners had abandoned the vessel and applied to him to undertake it. The vessel while lying on shore a wreck was liable to the admiralty liens created and contracted for by the owners; which were paramount to the mortgage. As against them the mortgage was of no legal validity. Until the mortgagee was put into possession under his mortgage he had no control over the vessel, nor could he be considered in the light of an owner.[1]

A passenger may lawfully, except under peculiar circumstances, depart the ship. Should he voluntarily remain on board, at the risk of his personal safety, to assist her in her distress, he may be entitled to remuneration for his services, Abbott, 560. And part of the crew of a vessel who remain on board after abandonment by the master and the rest of the crew, and under such circumstances that the abandonment was justifiable, are entitled to salvage compensation, if they perform valuable services. The passenger's personal safety required him to work to save the vessel; and the contract of a sailor excludes salvage compensation; but in extreme cases salvage compensation may be allowed both these descriptions of persons. Such, I apprehend, should the libellant's demand be considered. The vessel was actually abandoned by crew and owners, and not libelled in her wrecked and disabled condition by maritime

[1] Abbott on Shipping, 45, and following pages and notes.

creditors. The libellant had no right or claim to possession, but at the instance of the owners he discharged the services propounded for in the libel. He procured men to get the vessel afloat. Those men could libel the vessel for their services. So could those whom he employed to tow the vessel into port. So could those who repaired her and restored her to value. Instead of all those persons filing libels, this libellant filed one in his own name, which is by no means objectionable.

I am of the opinion that, under the circumstances, this libellant should not be deprived of the admiralty process and jurisdiction in enforcing his demand against this vessel. And I further think that equity and justice should postpone those libellants, who attached this vessel for debts contracted, while she was sailed by Weber and Churchill, her owners. The libellant should be considered entitled to recover for services as a salvor.

Decree accordingly.

For cases on salvage and the measure of compensation, see Bees' R., 139,170, 175, 178, 193, 201, 226; 2 Bouvier's Law Dictionary, 494; 2 Parsons on Shipping and Admiralty, 260–321.—[*Reporter.*

STURGES vs. STETSON.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—OCTOBER TERM, 1858.

1. FRAUDULENT ISSUE AND SALE OF STOCK.—The sale of stock in a railroad company by the directors at a less rate than the price fixed in the charter, is a fraud upon the law and the stockholders.

2. CONVERTIBLE BOND—WHEN MAY BE REDUCED.—The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void. Stock thus taken is, in the hands of a party with notice, subject to the right of prior subscribers to have it reduced to the charter value of the shares.

3. STOCK—HOW CREATED.—Stock can be created only by contract—there must be an agreement to take it.

4. POWER OF DIRECTORS.—A power given to the directors by the charter to sell the property of the company or notes and bonds belonging to it, does not apply to the capital stock, nor does the power to determine the time and terms of payment of subscriptions for stock have any reference to its price.

5. The case is different in principle from the sale of stock on execution or under the charter on default of payment, in which case the gain or loss is that of the delinquent stockholder, the other stockholders not being in any way affected.

6. It is not necessary that the charter contain a prohibition against taking subscriptions at less than the charter price.

7. FRAUDULENT ISSUE—WHEN A DEFENSE.—Although to an innocent holder the company would be liable for stock thus issued, these facts constitute a good defense to an action upon an executory contract for the purchase of such stock.

The facts are fully stated in the opinion.

Goddard & Stanberry, for plaintiff.

Worthington & Matthews, for defendant.

McLEAN, J.—This action is brought on a promissory note for $24,000, made to plaintiff by defendant, dated February 4th, 1853, and payable on demand.

The questions before the court are raised by the ninth plea, which states that the Hillsboro and Cincinnati Railroad

Company, on the 31st of January, 1853, was engaged in the construction of its line of road from Cincinnati to the Ohio river, at or opposite Parkersburg, in Virginia; that its capital stock, under various acts of the Legislature, was five millions of dollars, and was divided into shares of fifty dollars each; that the subscriptions of stock were regularly under the control of the board of directors for the time being, yet that neither the board of directors nor the company had power by their charter, or by the laws of the land, to issue and dispose of stock at less than fifty dollars per share; that the plaintiff, being a dealer in railroad stocks, entered into an unlawful scheme and device, with the board of directors, that they should execute to him a bond for $750,000, payable in January, 1858, without interest, and within four years from date, convertible into fifteen thousand shares of stock, at fifty dollars each; and that the said bond should be sold and delivered to the plaintiff for $521,677, payable on the call of the company, which sum was less by $228,333 than the amount of the shares purchased by him; and the plea further averred that the plaintiff, on the 4th of February, 1853, still holding six hundred shares of the above purchased stock, of which he represented himself to be the lawful holder, induced the defendant to purchase the same, and as a consideration for which he gave the promissory note on which the action is founded; and the power of the directors to issue the stock by the charter or under the laws of the state, at less than fifty dollars for each share, is denied.

To the special plea a general demurrer was filed.

In the original act of incorporation, the capital stock was limited to three hundred thousand dollars, to be divided into shares of $50 each. The sum of one hundred and fifty thousand dollars was required to be subscribed, before the structure of the road should be commenced. In a subsequent act, this sum was reduced to one hundred thousand dollars.

The 12th section authorizes the directors to require payment of capital stock subscribed, by installments, as they shall think fit; and if the installment shall remain unpaid for sixty days

after the time required, the board may collect the same by suit, or shall have power to sell the stock at public auction.

By the 15th section, the directors are authorized to mortgage the capital stock, to secure the payment of money borrowed.

The act of 1849 increased the capital stock to nine hundred thousand dollars; and the amendatory act of 1851 increased it to five millions of dollars. By a special act of 5th of February, 1851, the company was authorized to sell its bonds, issued for loans, and its notes and certificates, payable in money or property received as donations, or in payment of subscriptions to its stock, above or below par.

By the 5th section of the original act, the affairs of the company were vested in seven directors, a majority of whom were authorized to act; and, by the 6th section, it is declared that the directors may determine "the times and terms of payment of stock."

There appears to be nothing in the various legislative acts that constitute the charter of this company, which is not common to other railroad companies chartered in this state.

In the consideration of this case, it is necessary to ascertain the nature of the contract between the directors and the plaintiff. Was there a sale, or a subscription of stock, or both? When the parties came together, with a view to this transaction, there is no pretense to say that the fifteen thousand shares were stock. They constituted a part of the capital stock, as provided in the charter, but in no other sense were they stock. The corporate powers of the company were conferred for the express purpose of creating stock as a means of constructing the railroad. As well might the route for the road designated be called a railroad, as to call the corporate means of creating the stock, stock. In a legal point of view, it is important to call things by their right names. This is especially necessary when the effect of the exercise of corporate powers is to be determined.

Stock can be created only by contract, whether it be in the simple form of a subscription or in any other mode. There must be an agreement to take the stock, and nothing short of

this can create it. This imparts to the stock the quality of property, which before it did not possess. It is called capital stock in the charter, because the corporate capacity to create it is given. The term stock, as used in the charter, before it is taken by subscription, means nothing more than a power in the directors to receive subscription for stock.

The plea sufficiently shows that there was no sale of stock to the plaintiff, which had been previously issued, but an attempt to create the stock and sell it at the same time, as one transaction; and it appears that the discount of nearly one-third of the shares purchased, was a part of the contract of subscription; and this presents the great question in the case, whether the directors had power to issue the stock for less than its par value.

If it is not admitted in the argument, it is not controverted, that the commissioners who, before the organization of the company, received subscriptions of shares, had no power to receive them for less than the amount stated in the charter. But it is said that the subscription of the plaintiff was not received by the commissioners, but by the board of directors, who exercised all the powers of the corporation; and among others, the power of sale over its property; that the sixth section of the charter gives them express power over the stock, "to determine the time and terms of payment."

As capital stock is not property until it shall be subscribed for, the power given to the directors in the charter, to sell the property of the company, does not apply to the disposition of capital stock; and it seems to be clear that the power to determine the time and terms of payment of subscriptions of stock, can have no reference to its price. The charter declares the shares of the capital stock shall each be fifty dollars; and it would be contrary to all known rules of construction to say that a provision that applies only to the payment of stock subscribed, shall be so construed as to repeal the provision that fixes the value of each share.

There may be many instances where land is purchased for a depot, or for other purposes connected with the road, or where

work has been done on the road, or rolling stock furnished for it, a subscription for stock may be given, by the directors, in payment. But, whether land, labor, property or money be received in payment, the principle is the same. The directors may regulate the time and terms of payment, but they have no power over the price of each share.

In declaring that the capital stock should be divided into shares of fifty dollars each, the law was designed to give the same permanency to the limitation of the shares, as to the limitation of the capital stock. A subscription procured of fifteen thousand shares, amounting to the sum of seven hundred and fifty thousand dollars, with the understanding that it should be discharged on the payment of about one-third less, was a fraud upon the law and upon the stockholders. The term fraud is here used in no other sense than as an act done without the authority of law, and against the provisions of the charter, and this epithet legally applies, however innocently the act may have been done by the directors.

In regard to the price of the shares, the directors have no greater power over it than the commissioners had. They were both the instruments of the law, and were alike bound by its provisions. If power had been given to either to exercise a discretion so vital to the success of the scheme, as to vary the price of shares, it would have destroyed all confidence in the enterprise. The plaintiff seemed to have been convinced of this, from the plan adopted to receive from the company the first bond for seven hundred and fifty thousand dollars, to give to the act an appearance of fairness on the books of the company. It is essential to the success of any enterprise which involves the expenditure of money, that the contributors should be placed upon an equal footing in regard to the money paid. In this case the plaintiff received in stock $228,333 more than he paid for. This was a fraud on the stockholders who had paid in full for their shares.

It is said the directors had power to secure the payment of loans, by mortgage on capital stock. This is admitted. In the 16th section of the first act it is provided, that to secure

the payment of money and the interest thereon, borrowed, "the directors may pledge, by mortgage or otherwise, their entire road, fixtures, and equipments, with the income and resources thereof, together with the capital stock."

What was meant by the capital stock in this provision? Does it refer to the stock named in the charter, and for which no subscription has been made? Such stock is a legal fiction. It is not *in esse*, and, as such, cannot be a subject of mortgage. What security under the mortgage could it afford? It is, at least, nothing more than a right to subscribe for stock, which is common to all persons; and every one who does subscribe, confers a favor on the company. The power given to the directors to pledge the capital stock was, undoubtedly, intended to cover the capital stock, which was owned by the stockholders, and was property that might be mortgaged at the time.

It is admitted that stock may be sold on execution after judgment against a stockholder, under the statute, or it may be sold at auction, under the charter, for default of payment, at less than its nominal value. In either case the stock being property may be sold, as other personal property, for what it may bring. On a sale at auction, or execution, nothing is sold but the interest of the stockholder, and the purchaser acquires only his right.

If the stock has been paid for in part only, the new owner must pay the installments required under the rules of the company; and if he fail so to do, the stock may be again sold. The same rule of procedure applies where the stock is sold on execution. In neither case is it important that the stock should sell for the amount paid on it. If it sell for more it is the gain of the delinquent stockholder; if for less, it is his loss. But, by the sale, the interest of the other stockholders is not affected. If the stock has been paid in full, and it sell for half the amount so paid, the sale is valid and the interests of the other stockholders remain unaffected. The stock, like other property, being subject to the claims of creditors, is liable to loss on forced sales.

But such a procedure is altogether different in principle from the act of taking subscriptions of stock.

It is said there is nothing in the charter which prohibits the directors from taking subscriptions of stock for less than fifty dollars a share.

No such provision was necessary. The duties of the directors are plainly pointed out in the charter, and as their powers were wholly derived from that instrument, it was not necessary to prohibit them from doing that which the charter did not authorize them to do. The charter fixed the rates at which the shares should be subscribed. This is matter of law, and is no more subject to the discretion of the directors, than it was to the discretion of the commissioners, who first received subscriptions.

From the authority given to the directors to sell "notes, bonds, scrip, and certificates for the payment of money or property, which the company had previously received, as donations, or in payment of subscriptions to the capital stock," above or below par, an argument is drawn that stock may be disposed of to subscribers for less than fifty dollars a share. It appears to me the provision authorizes an inference in conflict with the one drawn. If bonds, or other instruments for the payment of money, be transferred at less than their face, with legal interest on the entire sum, in payment for the money loaned, it would be usurious; and this was the reason for the above provision. Without it, the sale of the bonds, &c., would have been illegal.

A certificate of stock was issued to the plaintiff for fifteen thousand shares, amounting to the sum of seven hundred and fifty thousand dollars, of which only five hundred and twenty-one thousand six hundred and seventy-seven dollars were paid, which was less for the shares than the price fixed by the charter, by two hundred and twenty-eight thousand three hundred and three dollars. This sum, distributed among the shareholders at the time of the transaction, will show the loss they sustained; and if this be a correct construction of the powers of the directors, they may continue to reduce the price of stock, at every subsequent subscription, down to five or ten dollars a share, distributing the loss upon prior stockholders. The last

subscribers, at whatever rate, would stand on an equality as to future dividends, and in all other respects, with the previous subscribers for stock, who had paid in full for their shares. The injustice of such a scheme requires no demonstration. It is in conflict with the charter.

From the high character of the individuals who compose this company, I feel bound to say that in my judgment, their error has arisen from a misconstruction of their corporate powers. But the principles of law apply to the act, and not to the motive, where no moral turpitude is involved. I think the subscription of the plaintiff, as made, was void.

This action is in the nature of a bill in equity for the specific execution of a contract, and the defendant may avail himself of any matter in defense, which goes to impair or make void the contract.

Whatever doubts may arise from the conflicting decisions in the courts of England and of the United States, in regard to fraud, and whether certain transactions are fraudulent *per se*, or are only evidence of fraud, being void or voidable, there would seem to be little doubt of the character of the case as made out in the plea, and which the demurrer admits. The allegations of fraudulent acts by the plaintiff in the procurement of the stock, are coupled with a want of power in the directors so to issue it.

The subscription of stock by plaintiff for less than the price of the shares fixed in the charter, was void, as against law and the power of the directors. But the stock procured by the plaintiff was open for subscription, and from the bond executed to him by the company for seven hundred and fifty thousand dollars, convertible into stock, and which he converted into stock, the books of the company represented a fair and legal transaction; and in the hands of an innocent holder of the stock so issued, the company would, I suppose, be held liable. While the law clothes a corporation with the powers of an individual to make contracts, it gives to it no immunity to practice frauds upon innocent persons.

But the defendant has never received the stock assigned to

him by the plaintiff. It was assigned to him as stated in the plea, and left in the Trust Company, to be delivered on the payment of the note sued on. But on a discovery of the frauds alleged in the plea, he refused to pay the note, and the question now is, whether he shall be compelled to carry out the contract for the stock.

If it be admitted that the defendant, on application to the company, or by legal coercion could obtain a recognition of his right to the six hundred shares of the stock, on the books of the company, is he bound to take such a course? If on a full knowledge of the facts set up in his plea, the defendant takes the stock, he holds it subject to the right of the stockholders, prior to the subscription of the plaintiff, to have it reduced to the charter value of the shares. This would take from him nearly one-third of his shares.

The contract of the plaintiff is executory. He occupies a point which gives him the option to pay the money, and carry out the contract, or to stand on the matters in bar, which he has set up in his plea. He has taken the latter ground, and it is for the court to say whether it is maintainable.

The defendant seems to have done nothing to preclude him from the defense set up in his plea, which stands admitted by the demurrer, and which, in my judgment, is a sufficient answer to the action.

The demurrer is overruled.

Consult Otter *vs.* Brevoort Petroleum Company, 50 Barbour, 247.—[*Reporter.*

FOSDICK vs. STURGES.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—OCTOBER TERM, 1858.

1. FRAUDULENT STOCK—WHEN PURCHASER MAY RECOVER MONEY PAID.—A purchaser of stock illegally issued by the directors of a railroad company at less than the charter price may rescind his contract and recover from his vendor who participated in the illegal issue of the stock the money paid for his stock.

2. The issue of the stock having been a fraud upon the law and the stockholders, the purchaser, although the stock has been regularly transferred to him upon the books of the company, and there was nothing in the transaction as to him to awaken his suspicion, may elect his remedy, and is not bound to remain content with the stock transferred to him.

3. WHEN STOCK MAY BE REDUCED—AND HOW.—A large amount of stock having been thus fraudulently issued, the prior stockholders being entitled to reduce it, in the hands of parties with notice, to the amount actually paid for, the fraud in which the vendor participated is material in its effects upon the rights of the purchaser.

The facts are fully stated in the opinion.

Worthington & Matthews, for plaintiff.

Mr. Goddard, for defendant.

McLEAN, J.—This action is brought to recover the sum of twenty-four thousand dollars, which was paid by the plaintiff to the defendant for stock in the Hillsboro and Cincinnati Railroad Company, on the ground of fraud.

The declaration states that on the 3d of January, 1853, the Hillsboro and Cincinnati Railroad Company were engaged in extending and maintaining their line of road to the Ohio river, at or nearly opposite Parkersburg, in Virginia; that the issue and disposal of the stock were vested in the directors for the time being; that Sturges, the defendant, entered into an unlawful scheme and device with the board of directors, who

issued a bond for seven hundred and fifty thousand dollars, convertible into stock at par, with an understanding that the bond should be discharged by another bond for the sum of five hundred, twenty-one thousand, six hundred and seventy-seven thousand dollars; that Sturges was elected to convert the bond of the directors into stock, and that they issued to him certificates for fifteen thousand shares of stock, at fifty dollars per share, amounting to the sum of seven hundred and fifty thousand dollars; that in payment for such stock as had previously been agreed upon, he executed a bond to the company for five hundred, twenty-one thousand, six hundred and seventy-seven dollars, payable when called for; leaving the sum of two hundred and twenty-eight thousand, three hundred and twenty-three dollars less than the par value of the stock; that the defendant represented himself to be the lawful holder of the stock, so issued to him, and he proposed to sell to the plaintiff six hundred shares of the stock, at forty dollars per share, amounting to the sum of twenty-four thousand dollars; and that the plaintiff believing he was the lawful holder of the stock, purchased from him the six hundred shares, having no notice to the contrary.

The declaration further avers, that Sturges was not the lawful holder of the stock, his subscription for the same being void, as having been made in violation of the charter, for a less price than fifty dollars per share, as fixed by the charter; and the declaration also alleges, that Fosdick received from Sturges an assignment of the six hundred shares of stock, which on application were transferred to him on the books of the company, and a new certificate issued to him, which he brings into court, to be disposed of according to law.

To this count in the declaration a demurrer was filed.

There are other counts in the declaration, but they are not before the court on the demurrer.

The contract declared on, has been executed. Sturges assigned to Fosdick the six hundred shares of stock, and he paid for them twenty-four thousand dollars; and on the presentation of the assignment to the company, the stock was regularly

transferred to him on its books. He had not, it seems, from the count demurred to, discovered the alleged frauds until after he had purchased the stock, and it had been regularly transferred to him, on the books of the company.

In the case of *Sturges vs. Stetson*, at the present term, it was held that the directors of the company had no power to receive subscriptions for stock at a less price per share than was fixed in the charter; and consequently, that notes given for stock, so obtained, could not be enforced. Such a subscription was held to be not only in express violation of the charter, but a fraud upon prior stockholders. Sturges, though holding by certificate his fifteen thousand shares of stock, regularly, to all appearance, entered upon the books of the company, was liable on the application to a court of chancery by a prior stockholder, to have his number of shares reduced to their par value.

Fosdick, on the demurrer, must be taken to be a *bona fide* purchaser of the six hundred shares of stock, without notice. The proceedings on the books of the company, in regard to the subscription of this stock by Sturges, can give rise to no suspicion of unfairness. The bond for seven hundred and fifty thousand dollars to be converted into stock, at the pleasure of the holder, in a limited time, was not out of the ordinary mode of business; and the issuing of the fifteen thousand shares on the surrender of the bond, could awaken no inquiry. The entire transaction in regard to the subscription of this stock, was apparently and clearly within the corporate powers of the company. Under such circumstances it appears to me that a *bona fide* purchaser of the stock could enforce a transfer of it on the books of the company.

The agents of a corporation have no license for the commission of wrongs. Their powers are limited, but when they circumvent and mislead to his injury an innocent individual, without knowledge to awaken his suspicion, the corporation is liable.

But the right to the six hundred shares of stock by Fosdick was admitted by the directors, and a regular transfer of it to

him was entered on their books. And this, it is said, was a consummation of his right, by which he acquired all he contracted for, and all that he expected to receive.

It is true the prospective completion and business of the road have not been realized. But this is a disappointment common to all persons who have engaged in such enterprises. They have given their time and money to objects which have advanced beyond all other improvements the agricultural, the commercial, and the social interest of the country; but they have generally realized heavy pecuniary losses. But these constitute no ground for the rescission of contracts, or of equitable relief, unless fraud be established.

In the illegal issue of the stock, Sturges and the company participated, and they may be equally responsible, to a *bona fide* purchaser. But if it be admitted that the company, under the circumstances, may be liable to Fosdick, does it follow that he may not exercise his own discretion in regard to the remedy? This seems to be a matter for the determination of the party rather than the court.

The frauds charged against Sturges consist in his participation in the fraudulent issue of the stock, declaring that it had been lawfully issued; in his false and fraudulent representation to Fosdick that he was the lawful owner of the stock, through which false and fraudulent assurances Fosdick was induced to purchase the six hundred shares. These averments of fraud, are all admitted by the demurrer, and must be taken as true.

But, if the frauds alleged do not materially affect the rights of the plaintiff, he is not entitled to a remedy against the company or Sturges. Of the fifteen thousand shares of stock, subscribed by Sturges, at the par value, he paid for only ten thousand four hundred thirty-three and a-half shares; leaving four thousand five hundred sixty-six and one-half shares, for which he paid nothing. These amount much nearer to the one-third than the one-fourth of the fifteen thousand shares subscribed, and, at the par value of these shares, they amounted to the sum of two hundred and twenty-eight thousand six hundred and seventy-seven dollars.

It was held in Stetson's case, that although the directors in receiving subscriptions for shares of stock, were bound by the price per share fixed in the charter, yet stock when once subscribed became property, and could be sold at any price fairly agreed upon, and that the assignment would convey the shares in full. The six hundred shares of stock were purchased by Fosdick at forty dollars per share, but each share was transferred, at its par value of fifty dollars. On the payment of twenty-four thousand dollars, Fosdick received in stock thirty thousand dollars, and any sum short of that amount will be so much less than he purchased and paid for.

There can be no question that any stockholder, prior to the subscription of Sturges, could, by legal coercion, reduce the stock subscribed by him to the number of shares he paid for, at their par value. And the same principle would apply to all the assignees of the stock, by Sturges, who had notice. This rule applied to Fosdick, would reduce his stock some one hundred and seventy-five shares.

But, if the rule should not apply to Fosdick, he being a *bona fide* purchaser, still the shares not paid for by Sturges must be distributed and apportioned among the prior stockholders, lessening the stock in value near one-quarter of a million of dollars.

In whatever light this question may be considered, it appears to me, there can be no escape from the conclusion, that the frauds complained of in the declaration are so material in their effect upon the rights of the plaintiff as to entitle him to a rescission of the contract, for the purchase of the six hundred shares of stock, and an action against Sturges for the money paid. The frauds, as alleged, are admitted to be true.

New issues may be raised, and a new aspect given to the case, in its future progress. But, as it now stands on the demurrer, with all the averments of the declaration admitted to be true, I feel bound to overrule the demurrer.

Consult also *Sturges vs. Stetson*, preceding case.—[*Reporter.*

BELL vs. OHIO LIFE AND TRUST COMPANY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—DECEMBER TERM, 1858.

1. PRIORITY OF JURISDICTION—DETERMINED BY SERVICE OF PROCESS.—Priority of jurisdiction as between the state and the United States courts is determined by the service of process, and not by the date of the commencement of the suit.

2. The appearance of counsel for defendants is a waiver of notice of an injunction.

3. SAME—NOT BY ISSUING OF PROCESS.—The rule that the issuing of a summons is such a commencement of a suit as to raise the statute of limitations does not apply to cases of this character; nor does the code of the State of Ohio contemplate that the simple issuing of the summons, without service or other appearance, shall give jurisdiction over the subject matter.

4. JURISDICTION HAVING ATTACHED IS EXCLUSIVE.—Where process has been served and an injunction issued in this court, jurisdiction attaches to the exclusion of a state court in which a suit had been previously commenced, but no process served.

5. OTHER COURTS AND OFFICERS NO AUTHORITY.—After the issuing of such an injunction a state court has no authority to take action or make orders in regard to the subject matter over which jurisdiction had been exercised by this court; nor have its officers any right to the possession of or control over such subject matter.

6. If they obtain such possession, or exercise such control, they are interfering with the process of this court.

7. This court will, in such case, order the return to its receiver of all property over which its jurisdiction had attached.

On the 16th of October, 1858, Bell and Grant filed in the clerk's office of this court, a bill against the Ohio Life and Trust Company, their assignees and others, upon which a subpœna was issued and served the same day upon five of the members of the company.

On the 18th, at ten o'clock A. M., upon notice to the defendants, who appeared in person and by their solicitors, the judges of this court made an order appointing a receiver of

the Trust Company, and enjoining the assignees from disposing of the assets and ordering them to hold the assets subject to the further order of the court.

These assets, consisting of notes, bonds, stock certificates, &c., were at that time in the actual possession of the assignees of the Ohio Life and Trust Company, and they had deposits with certain bankers in Cincinnati on current account.

On the same morning, but subsequent in time, in the presence of the parties, one of the judges of the superior court in Cincinnati made an order in a case then pending in that court, in which Spinning and Brown were plaintiffs, and the assignees of the Trust Company, defendants, appointing the sheriff of Hamilton county, receiver, and requiring the assignees to deliver the assets to him. This case had been commenced on the 14th of October, by filing a petition, and a summons had been issued on the same day, in accordance with the code of the state, but had not been served. The sheriff, without giving bond or taking an oath, immediately proceeded as such receiver to demand of the assignees the possession of the assets, and they were delivered to him by one of the assignees who had personal notice of the order made in this court. The receiver appointed by this court made due demand of the sheriff for the delivery to him of the assets of the company, at the same time exhibiting to him his authority as receiver under the order of this court. Delivery was refused by the sheriff, he claiming to hold the assets as receiver under an order of the superior court of Cincinnati.

Rule against the sheriff to show cause why he should not be attached for contempt.

Henry Stanberry & N. C. McLean, for plaintiffs.

C. D. Coffin, for defendants.

McLean, J.—If the priority of jurisdiction depends upon the order just made, there is no question it belongs to the United States court.

But it is claimed on the other side, that the priority of juris-

diction depends upon the commencement of the suit, and that the suit in the superior court was first commenced; and therefore the jurisdiction first attached in that court.

It is not controverted, that service of process was first made in the United States court; and that the first order in relation to the assets was made by that court; but it is alleged that the suit in the superior court was first commenced by the filing of the petition and the issuing of the summons, and that the jurisdiction of that court then attached before any service on the defendants.

1. When was the suit in the superior court commenced?
2. When did the jurisdiction of that court attach?

The ground is assumed by Judge Gholson, that the jurisdiction of the superior court was acquired over the defendants on the 14th of October, by the filing of the petition and causing the summons to issue.

The provision cited to maintain this position is section 55, of the code,[1] which declares, "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." And the judge very appropriately remarks, "Certainly, nothing less will suffice; and had any thing more been required, it is reasonable to suppose it would have been expressed."

With great respect to the learned judge, we are led, from a somewhat critical examination of the provisions of the code, to think its language is plain and unmistakable. We think there is nothing new or mysterious in the New York or Ohio codes, in the mode of bringing an action. We think there is nothing left to conjecture on this subject.

The mistake in giving a construction to the 55th section, seems to us, to consist in supposing the 55th section was intended to cover every necessary requisite to give jurisdiction over the parties, and the subject matter of the controversy. Now we are aware that the title in the code declares that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are

[1] Revised Statutes of Ohio, Swan & Critchfield, 2 Vol., p. 961.

abolished; and in their place, there shall be hereafter but one form of action, which shall be called a "civil action."

It was lately said by a distinguished judge, "This attempt to abolish all species, and establish a single genus, is proved to be beyond the power of Legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ."

The 56th section points out the duty of the plaintiff in the commencement of his action. He is required to file with the clerk a præcipe stating the names of the parties to the action, and demanding that a summons issue thereon; and the ensuing section, 57, declares the summons shall be issued by the clerk under the seal of the court, &c. It shall be directed to the sheriff of the county, and command him to notify the defendant named therein, that he shall answer the petition. And in section 60, when a writ is returned, not served, other writs may issue. In section 61, "the summons shall be served by the officer to whom it is directed, who shall indorse on the original writ, the time and manner of service." In section 73, "In all cases the return must state the time and manner of service." And again in 78, it is declared, "when the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title."

We suppose that all the sections of the code, having a direct relation to the commencement of an action, should be so construed as to carry out the expressed intention of the codifiers. The filing of the præcipe, the direction of the process to the sheriff to notify the defendants that they are required to answer the petition, and that the return of the officer must state the time and manner of the service, are all matters of positive requirement, and are plain and unambiguous.

And in the 20th section,—"An action shall be deemed commenced, within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor, or otherwise united

in interest with him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by service within sixty days."

The first part of this section is significant to show what is deemed the commencement of an action, as to each defendant at the date of the summons which is served on him; and also where service by publication is proper, the action shall be deemed commenced at the date of the first publication; and what shall be deemed equivalent to the commencement thereof. Now all these show that something more is requisite for the commencement of an action beyond that of filing a petition and directing a summons to issue. The other indispensable requisite, the service of the process, and the date of that service, to give jurisdiction of the subject matter of the controversy, seems to be indispensable. And it is not perceived how any other construction is consistent with the language of the code.

Every one knows that the commencement of an action will raise the statute of limitations. And for this purpose the suit is properly commenced before the process is served. If the bar is not complete before the date or issue of the summons, but becomes complete before service, it has been held that the commencement of the action shall date from the writ.

"When a court has jurisdiction of the subject matter and of the parties, the bringing a suit or action in that court," we are informed, "must be regarded as the beginning of the inquiry into the matter of controversy. From that time the jurisdiction of the court attaches."

Now that "the beginning of the inquiry into the matter in controversy," from which time the jurisdiction of the court attaches, means a hearing on the merits of the case, before process has been served or notice given to the defendants, is

sustained by no court. I presume, therefore, that I may have misapprehended the meaning of the learned judge on this point.

A reference is made in the case of *Carpenter vs. Butterfield*, 3 Johnson's Cases, 145, in which it was held, that the issuing a writ in a cause, is, for every material purpose, the commencement of the suit. But the point in controversy was, whether a debt or demand, to be set off under the statute, must be an existing debt or demand, at the time of the commencement of the plaintiff's action. And the court held the matter of set-off must exist at the time the suit was commenced, overruling former decisions, in which it was held that a matter happening after the beginning of the suit, but before plea pleaded, may be pleaded as a set-off.

In the notes appended to this case, a great number of authorities are cited to show that suing out the writ is the "beginning of the action." This is not doubted as to many purposes; though there are conflicting authorities on the subject. But it has been held that fictions of law should not work a wrong contrary to the truth.

We know that, in the king's bench, the bill of Middlesex is a mere order or command of the court, and has no *testo*, and is confined to the county in which the court sits. In every other county a *latitat* was the first process, grounded on a supposed previous return of a bill of Middlesex; but the modern English authorities consider the declaration as the exhibition of the bill, and the commencement of the suit. But why need we trust to the common law forms in the English courts, which are more curious than useful, to instruct us in the modified forms of pleading, especially when the code informs us there shall be hereafter but one form of action?

In *Johnson vs. Comstock*, 6 Hill, 10, which arose under the New York statute, authorizing the commencement of suits by declaration, it was held that the filing of a declaration is not the commencement of a suit; but the commencement dates from the actual service upon the defendant.

By the code of procedure of the State of New York, sections

106, 112, 113, 114, civil actions in the courts of record in that state shall be commenced by the service of a summons. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The New York code seems to contain all the material requisites to constitute a service under the Ohio code.

We are told, "there is strong negative evidence that the issuing, and not the service, of a summons, was intended by the powers of the code, to be the commencement of an action under our system." But we have been unable to find any negative evidence to sustain this supposition. Confident we are that all positive evidence is against it. We think the codifiers of Ohio have, with a great care and a wise circumspection, guarded the code against misconstruction as to the commencement of an action. Taking the sections of 55, 56, 57, 61, 63 and 78, no one, it seems to us, can fail to see and feel the force of the language used. Section 57 was not intended to describe the entire mode of bringing a civil action. That mode consisted of parts which made a whole, and consummated the thing designed.

An action, like every other thing, must have a beginning. The filing a petition is one thing, the præcipe another, and the issuing of the summons another, and the service return another; all these are in the code. They belong to the same class. In the order of time they succeed each other, and are essential to give jurisdiction over the parties, and the subject matter of the controversy. We contend for nothing more than this; and less than this, gives, as we think, no color of jurisdiction over the defendants.

On the 16th of October, the bill of Bell and Grant was filed in the clerk's office, and a subpœna was issued and served on five of the Trust Company; and on the succeeding Monday morning, under a notice, a motion was made for a receiver, and an injunction was laid upon the assets of the Trust Company, "and ordering them to hold the assets, subject to the further order of the court."

By the service of the process, no question can arise that the jurisdiction attached; and as little doubt can exist that the order "to hold the assets, subject to the further order of the court," fastened itself upon the assets. Prior to this, no steps had been taken, but to file a petition and issue a summons, which was not served.

Under the eleventh rule of the Supreme Court of the United States, it is declared, "No process of subpœna shall issue from the clerk's office, in any suit in equity, until the bill is filed."

And by the 7th rule, the process of subpœna shall constitute the proper *mesne* process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill, &c.

The 16th rule declares "upon the return of the subpœna, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry."

We have then the proceedings *in personam* against the defendants, and the proceedings *in rem* against the assets, prior in time to any steps taken by the sheriff. We deem it unnecessary to press the argument, however cogently it might be urged, that the process, having been served, necessarily drew after it the assets. But we have no occasion to resort to this ground. The proceedings *in rem* hold the property beyond question. The defendants appeared by counsel, and were heard in the case, and the order for the injunction was made, "and the defendants were ordered to hold the assets, subject to the further order of this court."

An appearance of counsel for defendants, has uniformly been held a waiver of notice of the injunction. In the case of *Varrards vs. Nagee*, a defendant was committed for a breach of an injunction, by Lord Eldon, though the only notice which he had of it was from the information of the plaintiff's solicitor.

The orders pronounced by the court in cases of special injunctions, have been various at different times. It appears from the precedents, that the form frequently adopted in spe-

cial injunctions, enjoined the party "till further order;" in some cases the injunction has been "till appearance and further order;" in others, "till answer and further order." But the form at present used, and which is established by a rule laid down by Lord Eldon, is, "till answer or further order." Eden on Injunctions, 382. In New York, injunctions are usually granted "until the further order of the court."

In the emphatic language of Chief Justice Marshall, in *Smith vs. McIver*, 9 Wheaton, 535, it is said, "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it."

In the case of *Daniels vs. Stevens*, 19 Ohio, 238, the court says "The great question in the case is a question of jurisdiction. A court of chancery, like a court of law, must have jurisdiction of the person as prescribed by law, &c. Before a decree can be operative, the court must have jurisdiction of the person, as well as of the subject matter."

In *Miers vs The Zanesville and Maysville Turnpike Company*, 11 Ohio, 275, the court says, "this bill was first filed; but the decree rendered, and the receiver first appointed, was in the other case. We think that he whom the law first authorizes to receive the tolls, should be protected in his possession; and we find the statute operates to confer this power by the decree. In the present race between creditors, whose equities are equal, this first authority to receive seems to us to confer the priority to the receiver of Muskingum, and that all questions of appropriation and priority must be settled in the court to which he renders his account."

What became of the action first commenced? The receiver was appointed in the second action. Does the first action still rest on the petition and summons?

The established rule is, that a *lis pendens* duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna, after the bill is filed.[1]

A court of equity will interpose by injunction to prevent

[1] Murray *vs.* Ballou, 1 Johnson's Chancery, 576.

the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks.[1]

The service of the writ is the commencement of the suit.[2] It is essential that the party should be duly summoned,[3] A court of chancery, like a court of law, must have jurisdiction of the subject matter and the person.[4] Every court, that its proceedings may have any validity, must have jurisdiction over the subject matter.[5]

The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is a case of undoubted jurisdiction.

If jurisdiction of a court once attach, subsequent irregularities will render the judgment voidable only.[6] Every intendment will be made to support the power of the court. Yet in proceedings of these courts, if they transcend the limits which the law prescribes, and assume to act where they have no jurisdiction, their acts are utterly void.[7] If the court here or elsewhere, has not jurisdiction of the person, nor of the subject matter, its proceedings are wholly void. Such judgments are as waste paper. They are no protection to those who seek to enforce them.[8]

A sale of lands by an administrator, under an order of a court having no jurisdiction to make the order is void.[9]

[1] Osborn *vs.* The Bank of the United States, 9 Wheaton, 738;

[2] Jenks *vs.* Phelps, 4 Connecticut, 149.

[3] The State *vs.* Bryce, 7 Ohio, part 2, 82, 83.

[4] Daniels *vs.* Stevens, 19 Id., 222, 238.

[5] Maxson *vs.* Sawyer, 12 Id., 195, 207.

[6] Lessee of Paine *vs.* Moreland, 15 Id., 435; Lessee of Boswell, *vs.* Sharp, Id. 447; Adams *vs.* Jeffries, 12 Id., 253, 271.

[7] Adams *vs.* Jeffries, 12 Ohio, 253, 273.

[8] Ibid, 273.

[9] Ludlow *vs.* McBride, 3 Hammond, (O.) 240, 255.

Where executions issue from a state court, and from a court of the United States, if there be no lien by judgment, the one under which a seizure is first made must prevail, and hold the property.[1]

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether it be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered in law trespassers."[2] In *Voorhees vs. Bank United States*, 10 Peters, 477, "if there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question." The same doctrine is stated in *Thompson vs. Tolmie*, 2 Peters, 157.

In *Williamson vs. Berry*, 8 Howard, 540, the court says, "We concur that neither orders nor decrees in chancery can be reviewed, as a whole, in a collateral way. But it is an equally well settled principle in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states."[3]

The multiplication of these authorities cannot be necessary and it only remains to apply them to the case before us.

[1] Brown *vs.* Clarke, 4 Howard, 4; Hagen *vs.* Lucas, 10 Peters, 400; Pulliam *vs.* Osborne, 17 Howard, 471.

[2] Elliott *vs.* Peirsol, 1 Peters, 328.

[3] Glass *vs.* Sloop Betsey, 3 Dallas, 6; Rose *vs.* Himely, 4 Cranch, 241.

Jurisdiction is claimed under the code by the superior court, from the fact that the petition was filed and the summons issued. And it is insisted, that this was the beginning of the action. In some sense it may be admitted to have been the beginning of the action; but in no sense, until the service of process, was it the exercise of a jurisdiction which affected the rights of the defendants. Whether we look to the forms of the common law, the chancery law, as adopted by Congress, or the code, a process or notice must be served on the defendants, before they are made parties.

In the 2d section, of the 3d article of the Constitution of the United States, it is declared "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," &c., and "between citizens of different states, and foreign states, citizens or subjects."

In *Boyle vs. Zacharie*, 6 Peters, 658, the court says, "The chancery jurisdiction given by the Constitution and laws of the United States, is the same in all the states of the Union; and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice, but the Act of Congress of 1792 has provided, that the mode of proceeding in equity suits shall be according to the principles, rules and usages, which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity of the parent country, as contradistinguished from that of courts of law, subject of course to the provisions of acts of Congress, and to such alterations and rules as in the exercise of the powers delegated by these acts, the courts of the United States may from time to time prescribe."

The provision in the Constitution, enabling citizens of other states and foreigners, to sue in the federal courts, has been uniformly considered a wise and necessary provision. It has been repeatedly eulogized by Chief Justice Marshall, and the great men, who with him, so fully illustrated and maintained the great principles of the Constitution.

In the organization of a national judiciary it was considered a matter of the highest importance to organize a federal court, within each state, which might to be supposed free from local influences and combinations, to which the citizens of other states, and foreigners, might resort for the maintenance of their rights. In carrying out this idea, it will be perceived, that no citizen of any other state, or a foreign citizen or subject, can be required to submit to the jurisdiction of a state court, in a civil case.

If sued in such court, he may remove the suit to the circuit court of the United States. For all the purposes of jurisdiction, the state is limited to its own territory, except it be substantially proceedings *in rem*, where the property within the state is made responsible, or by the acquiescence of those who live without the state or country.

The view of the learned judge who presided in the superior court, seems to be, that in disregard of the federal powers conferred on the courts of the United States, a state court may draw into its jurisdiction the assets of the Trust Company, and administer them under the code; on the ground that a petition has been filed, and a summons issued. There is believed to be no authority for the exercise of such a jurisdiction under our system. And confident we are, that under the Constitution of the United States, and the laws of Congress, this cannot be done. It, in fact, would be a subversion of the Constitution of the United States, and the laws of Congress, in regard to federal jurisdiction. If anything is to survive the code and the judicial power of the Union, it is the right of citizens of other states, and the citizens and subjects of foreign governments, to sue in the federal courts. It is true they may sue in the state courts, but there is no power in a state which can coerce them so to do. And if sued in a state court, the right of appeal is given. This was one of the great objects attained in the establishment of a federal judiciary. In numerous cases the Supreme Court has said, "in all the states the equity law recognized by the Constitution and by

acts of Congress, and modified by the latter, is administered by the courts of the United States."[1]

In the case of *Shelby vs. Bacon*, 10 Howard, 71, this court says they have no doubt the complainant may file his bill in the circuit court. And they say, "suppose the assignees had reduced to possession the whole amount of the assets of the Bank of the United States, chartered by Pennsylvania, and held them ready for distribution, could it be doubted that the complainant would have a right to file his bill in the circuit court, not only to establish his claim against them, but also for a proportionate share of the assets."

This shows that the courts of the United States, in the discharge of their duties, are bound to carry out their constitutional powers in regard to the claims of non-resident citizens and foreigners, without the aid of the state courts.

Spinning & Brown, in the superior court, rested alone on their petition and summons. Bell & Grant filed their bill in the clerk's office, and issued their subpœna, and it was served on five of the defendants, before any process was served by Spinning & Brown. That the jurisdiction attached under the process of Bell & Grant is undoubted. And it is equally clear, and indeed is not denied, that the assignees were enjoined by the circuit court, and ordered to hold the assets subject to the further order of this court. This order being prior to the action of the superior court, and being in exact conformity with the special orders in Eden on Injunctions, and with the rule of Lord Eldon, settles this controversy. And there was an appearance of counsel in behalf of the assignees. The proceedings were *in rem*. Nothing more was wanting.

We do not doubt that in the hurry and confusion of the hour, the superior court mistook the effect of the order of this court, and that they will direct the receiver to restore the assets to the possession of the receiver of this court.

It is clear, as we think, that the superior court had no power to interfere with these assets, "after the assignees had been directed to hold them, subject to the further order of this

[1] Neves *vs.* Scott, 13 Howard, 268.

court." The receiver of the superior court was undoubtedly a trespasser, in removing the assets, and taking them into his own possession, but believing that he acted in good faith in obeying the order of the superior court, which, as we suppose, was made under an erroneous impression as to the effect of that order, we shall exonerate the receiver from all responsibility, on the return of the assets to the possession of the receiver of this court.

It would be painful for us to take any further step in this cause, but not doubting that the assets of the Trust Company are vested in this court, by the first service of the process in this court, through which its jurisdiction attached; and by its proceeding *in rem*, which "enjoined the assignees from disposing of these assets, and ordering them to hold the assets, subject to the further order of the court;" and that in virtue of these proceedings, the superior court could have no rightful jurisdiction, we are constrained by a sense of duty, to require the return of the assets by the receiver of the superior court, to the possession of the receiver of this court.

Where different courts have concurrent jurisdiction, the one whose jurisdiction first attaches has paramount authority, and cannot be ousted by subsequent proceedings in other courts. Stearns *vs.* Stearns, 16 Massachusetts, 171; Bemis *vs.* Stearns, Id., 203; Eaton *vs.* Patterson, 2 Stewart and Porter, 9; Thompson *vs.* Hill, 3 Yerger, 167; Hall *vs.* Dana, 2 Aiken, 381; The Robert Fulton, 1 Paine, 621; State *vs.* Yarbrough, 1 Hawks, 78; Cleveland, Painesville & Ashtabula R. R. *vs.* City of Erie, 1 Grant, (Pennsylvania,) 212; *ex parte* Bushnell, 8 Ohio State, 599; Merrill *vs.* Lake, 16 Ohio, 373; Henry *vs.* Tupper, 27 Vermont, 518; Bank *vs.* Rutland and Burlington R. R. Co., 28 Vermont, 470; Conover *vs.* Mayor, &c. of New York, 25 Barbour, 513; Keighler *vs.* Ward, 8 Maryland, 254; Gould *vs.* Hayes, 19 Alabama, N. S., 438; *ex parte* Robinson, 6 McLean, 355; Clepper *vs.* The State, 4 Texas, 242.

The United States courts cannot enjoin a sheriff from selling, under process from a state court, Ruggles *vs.* Simonton, September Term, 1872, Western District of Wisconsin, in United States circuit court, to be reported in these reports.

A state court will not discharge on a writ of *habeas corpus* county supervisors who have been arrested by the marshal on attachment from the United States circuit court for refusing to levy a tax ordered by that court, though they had been enjoined by the state court from levying such tax. The United States court having jurisdiction, they should be remanded to the custody of the marshal. *Ex parte* Holman, 28 Iowa, 88, where numerous authorities are cited.

Where a United States officer holding a prisoner by United States authority, is served with a writ of *habeas corpus* issued by a state court, he should make a return, and show how he holds the prisoner. The state authority should thereupon abstain from longer interference, and any proceedings thereafter are illegal. United States *vs.* Doss, 11 American Law Register, 320. Where both the state and United States authorities have concurrent jurisdiction, the one which first assumes it will retain it until final judgment.

The tribunal which first has jurisdiction will retain it. Hines *vs.* Rawson, 40 Georgia, 356; West *vs.* Morris, 2 Disney, 415.

A federal court will not enjoin persons from proceeding in a state court, &c. Bryan *vs.* Hickson, 40 Georgia, 405.—[*Reporter.*

HILL vs. WINNE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—JANUARY, 1859.

1. JURISDICTION.—The United States Courts have not jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgagor and mortgagee are citizens of the same state.

2. MORTGAGE IS CHOSE IN ACTION.—A mortgage is a chose in action within the meaning of the eleventh section of the Judiciary Act.

3. ELEVENTH SECTION JUDICIARY ACT.—The rule that a promissory note payable to bearer is excepted from the prohibition of this section does not apply to an accompanying mortgage.

4. Doubtful jurisdiction not entertained.

Bill of foreclosure.

The complainant represents himself as a citizen of the State of New York, and as such, claims the jurisdiction of this court. It is charged in the bill that the defendant made and delivered to one J. J. Tallmadge a note, whereby he promised to pay said Tallmadge or bearer, two thousand seven hundred dollars, for value received. And to secure the payment thereof, executed and delivered to said Tallmadge the mortgage upon which this suit is brought, which note and mortgage have been sold and delivered by said Tallmadge to complainant.

The bill prays the usual decree of sale of the mortgaged premises.

The defendant pleads that he is a citizen of this state; and that J. J. Tallmadge, the mortgagee, was at the date of the mortgage, and also at the time of the filing of this bill, a citizen of this state.

Finches, Lynde & Miller, for complainant.

Winsor & Smith, for defendant.

MILLER, J.—This is intended as a plea to the jurisdiction of this court.

If this bill had averred that the note and mortgage were given to the complainant, in the name of Tallmadge, it might be inferred that the complainant was entitled to prosecute this suit, as the equitable owner of the mortgage. But it is averred that the note was given to Tallmadge, and he sold and delivered it to the complainant.

By the Constitution and the act of Congress, organizing the courts of the United States, suits at law, or in equity, can be sustained between citizens of different states; one of the parties being a citizen of the state wherein the suit is brought. A citizen of some other state may sue a citizen of this state, or a citizen of this state may sue a citizen of some other state, if found within this state, so that process can be served on him. It is certain that Tallmadge could not sustain a suit in this court against Winne, they both being citizens of the same state. By the eleventh section of the Judiciary Act,[1] "no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or *other choses* in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

According to the prevailing practice in the circuit and district courts, under rulings of the Supreme Court of the United States, this plaintiff could prosecute a suit at law against Winne, the maker of this note, as this provision of law is inapplicable to notes payable to bearer; upon the ground that the

[1] 1 United States Statutes at Large, 78.

original promise is to pay any person who may happen to be the bearer; and that as the interest in such a note passes by mere manual delivery, the plaintiff cannot, therefore, be said to claim in virtue of an assignment.[1] This prohibition is decided in *Gibson vs. Chew*, 16 Peters, 315, to embrace a joint suit against the maker and endorser of a promisory note, where they both are citizens of the same state; and for this reason, a law of a state authorizing such joint suit, is not to be recognized in the federal courts.[2] It also extends to a general assignee of an insolvent debtor,[3] and to an assignee of a bond and mortgage.[4]

The jurisdiction of this court is claimed for the complainant, on the ground, that as the note passed by manual delivery merely, without an assignment or endorsement, such transfer carried with it the equitable interest in the mortgage. It is true that, in equity, the debt or note is treated as the principal, and the mortgage as the incident, which passes by the transfer of the note, and is discharged by its payment. But we have a note and mortgage delivered by one citizen of this state to another; and at the time of filing the bill they are both citizens of the same state. There is no replication to this plea, that the plaintiff was either beneficially or equitably entitled to the contents of the note and mortgage at their inception. The bill sets forth that the mortgagee sold and delivered the note to the plaintiff. It should be pleaded, but it possibly may be inferred, that this suit is carried on in the name of the plaintiff for the mortgagee's benefit. If so, it is virtually a suit between citizens of the same state. If this matter had been specially pleaded, and not denied, it would be the duty of the court to dismiss the bill.[5]

[1] Bullard *vs.* Bell, 1 Mason, 251; The Bank of Kentucky *vs.* Wister, 2 Peters, 318; Smith *vs.* Clapp, 15 Peters, 125; Young *vs.* Bryan, 6 Wheaton, 146; Bonnafee *vs.* Williams, 3 Howard, 574.

[2] Keary *vs.* The Farmers & Merchants' Bank of Memphis, 16 Peters, 89; Dromgoole *vs.* The Farmers & Merchants' Bank of Mississippi, 2 Howard, 241.

[3] Sere *vs.* Pitot, 6 Cranch, 332.

[4] Sheldon *vs.* Sill, 8 Howard, 441; Smith *vs.* Kernochen, 7 Howard, 198.

[5] Smith *vs.* Kernochen, 7 Howard, 198.

The note is a general security, not payable to any particular person; the mortgage is a special security to the mortgagee. The one is transferable by manual delivery; the other by assignment. The note is independent of the mortgage, and it may be sued on by the holder, under the presumption that it may have been delivered to him by the maker, as it was not made payable particularly to the person named as payee. But the mortgage is executed and delivered to the mortgagee, and his assigns, whereby we have notice that it is a contract or chose in action between citizens of this state, transferable at law only by assignment. Chief Justice Marshall, in the opinion in *Sere vs. Pitot*,[1] remarks: "Without doubt, assignable paper, being the *chose in action* most usually transferred, was in the mind of the legislature when the law was framed, and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the Legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments." If there was any transfer of this mortgage it was a mere equitable one, which should not under the evidence on the face of the mortgage of the real parties, entitle the complainant to prosecute this suit. With the same propriety might the jurisdiction of this court be claimed by a non-resident assignee of an insolvent debtor, who is a citizen of this state; or by the holders of mortgages given to railroad companies within this state, or their assigns, where their objects and the parties are strictly local. At all events, I consider the jurisdiction doubtful; and according to the practice of the court not to entertain doubtful jurisdiction, this bill will be dismissed.

[1] 6 Cranch, 332.

THE WELLINGTON.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—APRIL, 1859

IN ADMIRALTY.

1. GOODS STOWED ON DECK.—Under an ordinary bill of lading the carrier is liable for goods stowed on deck and necessarily jettisoned.

2. BILL OF LADING—WHEN NOT AFFECTED BY PAROL PROOF.—Although as a receipt a bill of lading is subject to explanation, and can be affected by parol proof, in so far as it is a contract, this rule does not apply.

3. SAME—LEGAL CONSTRUCTION AS TO STOWAGE.—Although it is not expressly stated in the bill of lading that all the goods shall be stowed under deck, yet such is its legal construction and effect, and proof of conversations before or at the time of its execution is not admissible to alter it in this respect.

4. WHEN FREIGHT MAY BE STOWED ON DECK.—If the master wished to stow a part of the goods on deck, he should have made a proper memorandum in the bill of lading, or obtained the written consent of the shipper, or have discriminated in the price of freight.

Libellant shipped on board this vessel, at the port of Vermillion, in the state of Ohio, to be delivered at the port of Milwaukee, six hundred and thirty-five barrels of apples. The bill of lading is a clean bill—dangers of navigation only excepted, and duly signed by the master. One hundred and ninety-five barrels of the apples not having been delivered to the consignee, this libel was brought to recover their value. It appeared that this number of barrels had been stowed on deck, and in a storm were necessarily jettisoned. Depositions were offered in evidence to show, that the libellant verbally consented that any barrels which could not be stowed below, might be stowed on deck. It appeared on the part of the libellant, that he gave no directions as to the stowage of his apples, and he had left two days before they were received on board. By the bill of lading the whole number of barrels was to be delivered to the consignee at Milwaukee, for thirty cents per barrel, full freight.

Wm. P. Lynde, for libellant.

John H. Van Dyke, for respondent.

MILLER, J.—It is well understood, that when goods are stowed on deck, with the consent of the owner, no loss by justifiable jettison can be recovered for, unless the accident, by which they are lost, would have been equally fatal if they had been under deck. *Lawrence vs. Minturn*, 17 Howard, 100. *The Waldo*, Davies' Reports, 161.

Between the shipper and the carrier the bill of lading is not conclusive as a receipt.[1] The quantity and condition of the goods receipted for can be proved by parol to vary the bill of lading as a receipt.

The bill of lading does not state in express terms that the six hundred and thirty-five barrels of apples shall be stowed under deck; but this is a condition tacitly annexed to the contract by operation of law, and it is equally binding on the master, and the shipper is entitled to its benefits as a contract, as if it were stated in express terms. And this bill of lading not making distinction as to the amount of freight per barrel, implies a contract to stow the whole number of barrels under deck. Full freight is charged without exception. The parol evidence offered of conversations between the owner and the master before the bill of lading was signed and delivered, respecting the stowing of such barrels as the hold would not receive is inadmissible, as not evidence controlling the contract afterwards reduced to writing and delivered. Nor could such evidence of conversation at the time of the execution and delivery of the written contract be received, to control or vary the bill of lading, whether it expressly stated that all the goods should be stowed under deck or not. In the case of *Lawrence vs. Minturn*, there was a written contract that the article shipped should be placed on deck. In the case of *The Waldo*

[1] Abbott on Shipping, 320, and cases cited; 324 and cases cited. Goodrich *vs.* Norris, Abbott's Admiralty R., 19; Manchester *vs.* Milne, Id., 115; Zerega *vs.* Poppe, Id., 397; Baxter *vs.* Leland, Id,, 348; Worden *vs.* Greer, 6 Watts, 424; Barrett *vs.* Rogers, 7 Massachusetts, 297.

a quantity of potatoes were stowed on deck, and being damaged by water were thrown over. Parol proof offered to show consent on the part of the shipper that they should be placed on deck, was rejected. In *Barber vs. Brace*, 3 Connecticut 9, the defendant offered parol testimony, to prove, that at the time the bill of lading was executed, there was a verbal agreement to transfer the gin on the sloop's deck. The testimony was rejected, on the ground that the conversation both before and at the time the writing was given was merged in the written instrument. In *Sayward vs. Stevens*, 3 Gray, 97, the bill of lading was in the usual form except "seven boxes of shingles on deck." The plaintiff offered to prove by parol that all the articles stowed on deck were so stowed with the defendant's knowledge and assistance. The evidence was rejected. In the case of *Creery vs. Holly*, 14 Wendell, 26, it appears that ninety barrels of wrought iron shipped on a clean bill of lading, were placed on deck, and thrown overboard in a storm. Parol evidence of consent of the shipper, that the goods might be so stowed was not received. The court, by Nelson, C. J., remarks, "It is true that nothing is said in the bill of lading as to the manner of stowing away the goods, whether on or under deck; but the case concedes that the legal import of the contract, as well as the understanding of the usage of merchants, impose upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of the law upon the face of the instrument parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was a part of the contract, 8 Johnson, 189. It seems to me it would be extremely dangerous and subject to the full force of every objection, that excludes the admission of this species of evidence, to permit any stipulation, express or implied, in those instruments, when free from ambiguity, to be thus varied; and besides, from the high character given to those instruments in commercial business would expose the insurer and purchaser to frauds." In *Vernard vs. Hudson*, 3 Sumner, 405, a witness was permitted to testify to a verbal agreement, that a portion of the goods might

be stowed on deck. The court declared the implied condition of a clean bill of lading, that the goods should be stowed under deck, but thought the evidence admissible, as not contradicting or varying an express written contract. The court in commenting on the case says, "there is the clear fact, that a full under-deck freight is stipulated for in the bill of lading, a fact certainly not easily reconcilable with the supposition that they were to be carried on deck. So that the preponderance of the evidence decidedly is that there was no such agreement to carry the goods on deck. If it had existed, one of two things ought to have occurred, either that under deck freight should not have been payable, or that there should have been some written memorandum on the bill of lading, to repel the inference from a full freight being stipulated for." In the case of *Knox vs. The Ninetta*, Crabbes' R., 534, a cargo of wheat was shipped on a clean bill of lading. It was alleged on the part of libellant, that a parol agreement was also made, that no other cargo should be received on board, and that the voyage should be made directly and without deviation. Evidence of this parol agreement was received by the court, on the ground that the bill of lading was a mere receipt. But it seems to me, that parol evidence was proper in that case to show the deviation. The verbal agreement was nothing more than an acknowledgment on the part of the master of his implied duty. And if by receiving additional cargo on deck, the cargo of wheat became damaged, the liability of the vessel had attached without the verbal agreement.

If the shipper of his goods was warned as to the manner in which they would be stowed, he cannot maintain an action occasioned by bad stowage; or if he interfered and directed in the manner of stowing.[1] But that is not in this case. The bill of lading was made out and delivered to the owner, who had left for his home two days before the apples were received on board. There is no complaint of bad stowage. The apples stowed under deck were carried safely and delivered. The

[1] Meyer *vs.* White, 32 English Chancery Reports, 429; Flanders on Shipping. §§ 215, 201.

master should have made a memorandum on the bill of lading, or have required the written consent of the shipper on the bill, that the number of barrels not receivable under deck might be shipped on deck,—or have discriminated on the bill as to the price of freights of the barrels to be shipped on deck. Here was a clean bill of lading, the transfer of which would vest the title to six hundred and thirty-five barrels of apples, in a purchaser. The transfer of of goods shipped, by indorsement of bills of lading has become so common, that the interests of commerce require that such instruments should not be controlled by parol evidence.

Decree for libellant.

That a bill of lading in the usual form containing no stipulation that the goods shipped are to be carried on deck, implies a contract that they shall be carried under deck, and that parol evidence to the contrary will not be received, is also affirmed in Creery *vs.* Holly, 14 Wendell, 26; Sayward *vs.* Stevens, 3 Gray, 97.

In so far as a bill of lading is a contract, parol evidence is not admissible to vary it terms. Bradley *vs.* Dunipace, 1 Hurlstone & Coltman, 521; Butler *vs.* The Arrow, 1 Newberry, 59.

Evidence of mistake in not striking out clause in a receipt limiting the liability of the carrier admitted in Choteau *vs.* Leech, 18 Pennsylvania State, 224.

As far as respects agreement to carry and deliver, a bill of lading must be construed according to its terms. Portland Bank *vs.* Stubbs *et al.*, 6 Massachusetts, 422; Barrett *et al. vs.* Rogers, 7 Massachusetts, 297; Price *vs.* Powell, 3 New York, 322; Ellis *vs.* Willard, 9 New York, 529; Bradstreet *vs.* Heron, 1 Abbott's Admirality, 209; Zerega *vs.* Poppe, Id., 397.

Where, however, the bill of lading specifies that the freight is to be shipped on deck, and contains the usual clause, "dangers of navigation excepted," the shipper cannot recover if it is necessarily jettisoned, The Milwaukee Belle, to appear in succeeding volume of these reports.

Where goods stowed on the main deck of a propeller were necessarily jettisoned, the owner was held entitled to the benefit of general average, and owner of vessel not liable as common carrier, Gillett *vs.* Ellis., 11 Illinois, 579.

Contra.—In Johnson *vs.* Crane, 1 Kerr, 356; the Supreme Court of New Brunswick held that the master of a ship who signed the usual bill of lading, was not liable for a loss by the jettison of goods laden on deck with the knowledge and consent of the shipper and consignee. See also, Gould *vs.* Oliver, 4 Bingham, (N. C.) 142; Story on Bailments, §530, and cases there cited; 1 Parsons on Shipping and Admiralty, 266-7; also Id., 352-7, and many authorities there cited.—[*Reporter.*

WOODBURY vs. CRUM.

CIRCUIT COURT.—NORTHERN DISTRICT OF OHIO.—MAY TERM, 1859.

1. WHEN SECURITY TO INDORSER WILL DISPENSE WITH NOTICE.—The transfer of property by the maker of a promissory note to the indorser for the express purpose of paying the debt will dispense with notice of non-payment, if the amount of property thus assigned be sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned.

2. If, however, the assignment to the indorser is in trust for general creditors, and sufficient only for the payment of a small portion of the debts of the maker, such transfer, although including all the debtor's property, is not sufficient to excuse the want of notice to the indorser.

This was an action on a promissory note for $1,144, bearing date May 23, 1853, made by U. P. Coonrod, payable to Robert Crum, or bearer, thirty months after date, with interest after six months, and indorsed by the payee to the plaintiffs.

The declaration contained, in addition to the common counts, a special count averring that the note was made by Coonrod to the defendant, and by him assigned to plaintiffs in payment of a debt due them from the defendant at the time, and that prior to the maturity of the note, the maker became insolvent, and assigned all his property to the indorser in trust for the payment of his debts generally. It also contained the usual averment of non-payment by the maker, with notice to the indorser.

The trial, with a plea of the general issue and notice of set-off, was had before a jury.

The plaintiffs produced the note and proved its execution, and also that at or about the time it bears date the defendant, who had been a dry goods merchant in Tiffin, Seneca county, Ohio, and who had become largely indebted to plaintiffs and others, for goods purchased in New York, sold and transferred his stock of merchandize in Tiffin, to U. P. Coon-

rod, and received in payment his promissory notes, payable on long time; one of which—the note in suit—was transferred to the plaintiffs by defendant in payment of the debt due them at that time, to $1,225 or thereabouts.

On the 11th of November, 1854, U. P. Coonrod, the maker of the note, having become badly insolvent, assigned all his property to Robert Crum, the defendant,in trust for the benefit of his creditors. The amount thus assigned would pay the creditors on final distribution, no more than fifteen cents on the dollar.

On the 26th day of November, 1855, the note having matured, payment was demanded of the maker, then in Tiffin, where the defendant also resided, and notice of non-payment was made out in writing, placed in an envelope directed to the defendant, and lodged in the post-office at Tiffin, by the notary, on the same day.

Spalding & Parsons and *W. F. Stone*, for plaintiffs, contended that, under the circumstances, no notice to the indorser was necessary as he had no right to require the holders of the note to make demand of the maker, and to give notice of non-payment after he had deprived him of responsibility, by taking from him "all his property." And they strongly contended that where the ability of the maker to pay, was entirely exhausted by the assignment of his effects to the indorser, in person, it made no difference in the law of the case, whether the assignment was made directly and exclusively to the endorser, to satisfy his liability on the note, or, whether, as in the case at bar, it was made to him in the character of a trustee for all the creditors of the insolvent debtor. In either case a notice of non-payment to the indorser, could be of no possible service. The following among other authorities were cited by plaintiff's counsel.

Bond vs. Farnham, 5 Massachusetts, 170; *Barton vs. Baker*, 1 Sergeant & Rawle, 334; *Prentiss vs. Danielson*, 5 Connecticut, 180; *Mechanics' Bank vs. Griswould*, 7 Wendell, 165; *DeBerdt vs. Atkinson*, 2 H. Blackstone, 336; *Valk vs*

Timmony, 4 Massachusetts, 113; *Corney vs. DaCosta*, 1 Espinasse, 302; *Rhett vs. Poe*, 2 Howard, 457; *Develing vs. Ferris*, 18 Ohio, 170; *Watt vs. Mitchell*, 6 Howard, Mississippi, 131; *Torrey vs. Foss*, 40 Maine, 74; *Commercial Bank of Albany vs. Hughes*, 17 Wendell, 94.

S. B. & F. J. Prentiss, with whom was *James Pillars*, for defendant, maintained that, in no case, could notice of non-payment be dispensed with in a suit against the indorser, upon the ground that property had been assigned to him by the maker of the note, unless it appeared in evidence that the amount thus assigned was fully sufficient to satisfy the debt.

They further contended that a substantial distinction could be taken between an absolute assignment of property to the indorser to pay the specific debt, though not sufficient in amount for the purpose, and an assignment of all the maker's property to the indorser, as a trustee for all the creditors: that in the former case notice might well be dispensed with without producing the like consequences in the latter. They cited several cases, but relied mainly on *Creamer vs. Perry*, 17 Pickering, 332.

McLean, J., charged the jury, that in case the maker of a note transferred property to the indorser for the express purpose of paying the debt, then subsequent notice of non-payment by the maker would be dispensed with, if the amount of property thus assigned was sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned.

The learned justice admitted the strength of the authorities referred to by plaintiffs, but said he was inclined, for the present, to rule that the assignment by Coonrod to Crum, being in trust for general creditors, and being sufficient in amount for the payment of no more than fifteen cents on the dollar of the debts, although it included all his property, was not sufficient in the law to excuse the want of notice to the indorser, or to show due diligence in the holder.

The jury returned a verdict for the defendant.

WALKER vs. OGDEN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1859.

1. FORFEITURE OF STOCK—HOW MADE.—The provision in the articles of agreement of a private joint-stock company, that upon default by a stockholder of payment of assessments, all his shares, right and interest in the association and its property shall be forfeited, does not authorize the trustees by a naked declaration to make a forfeiture against which a court of equity will not grant relief.

2. REDEMPTION—WHEN ALLOWED.—The fact that the complainant with the acquiescence of the trustees, gave security for the payment of his assessments already overdue is of material assistance in entitling him to redeem.

3. Upon payment of the amount due, principal and interest, such a stockholder will be allowed to redeem, and the trustees will be ordered to make and deliver the proper certificates of stock.

4. *It seems* that where the articles of agreement do not provide an express mode in which stock is to be forfeited, a valid foreclosure cannot be made without the decree of a court of equity

This was a bill in chancery, filed by Walker, to compel the defendants who, together with E. R. LeBar, deceased, were the trustees of the Chicago Land Company, to issue to him a certificate for one hundred and sixty-six shares of stock in said company, which the defendants claimed had been forfeited to the other stockholders for non-payment of assessment.

It appeared that the complainant with others were associated together in a voluntary joint stock enterprise for the purchase of lands in and about Chicago, in 1853, with the view to profits by anticipated enhancement in value. The entire stock was divided into eighteen thousand shares of one hundred dollars each. Walker subscribed for one thousand five hundred shares. The payment of twenty-five dollars entitled each subscriber to one full paid share of stock purporting to be of the value of one hundred dollars. Walker had made one payment, and was the owner of two hundred shares of stock.

By the articles of agreement, it was provided that the trustees should have the power, and it should be their duty to make assessments upon the shareholders to meet such amounts as were necessary to make the successive payments falling due on the purchases of real estate made by them upon credit; and to give thirty days notice of the time of payment of such assessments, directed to the post-office address of each shareholder; and if any shareholder should fail to pay the assessment so called for at the time specified, he should thereby forfeit all his shares, right and interest in the association and its property and effects of any sort and kind, except such shares as might have been previously issued to him; such forfeited shares to be distributed among the other stockholders who were not in default.

The trustees, on the 19th of July, mailed a notice to Walker, which was signed by W. B. Ogden and M. D. Ogden, personally, and by E. R. LeBar, the other trustee, by M. D. Ogden as his attorney in fact. The trust agreement authorized one trustee to appoint any associate trustee or trustees as his attorney. The power of attorney from LeBar to Ogden was dated on the 18th of July, 1853, but was not executed until the 22d of July, and its execution was not acknowledged, but proven. No execution, however, was admitted in this case.

In October, 1854, the trustees, in pursuance of the express instructions of the stockholders, consummated the forfeiture of Walker's stock by sending to him a formal written notice of such forfeiture, the receipt of which notice was acknowledged by him, by a letter in which he denied the legality of such forfeiture, and professed his readiness to pay the amount due, and his determination to hold the trustees responsible, and to contest the right to forfeit his shares, but he made no tender of the amount due on it until March, 1855, at the time of filing the bill.

It appeared by the testimony of S. H. Fleetwood, that in October, 1853, Walker requested him to give further time on his assessment and to receive certain acceptances of Ward & Bro., of New York, for the amount due. Upon the delivery

of which to him, Fleetwood issued to Walker the certificate for the one hundred and sixty-six shares of stock and received it back for Walker as collateral security for the payment of the acceptances. These acceptances were not paid when due and were renewed by Fleetwood, and were all finally dishonored, and the house of Ward & Bro. became bankrupt. There was evidence showing a knowledge on the part of the trustees of the receipt of these acceptances by Fleetwood, and of an implied acquiescence in it by them. But such ratification was denied by them in their answer, and it appeared that they had never received the acceptances from Fleetwood, but refused so to do, and took from him the certificate of stock issued to Walker for the one hundred and sixty-six shares, and caused it to be cancelled.

J. M. Cassin & R. J. Walker, per se, for complainant.

E. C. Larned & I. N. Arnold, for defendants.

Drummond, J.—My opinion is that the assessment was legal and proper, and that a sufficient notice was given to Walker. If there was an illegality or irregularity in the assessment, the burden of proof was on the complainant to establish it, and he has failed to do so. But irrespective of the presumption of law of its regularity, I think upon the evidence before me that its legality is sufficiently established in every substantial particular.

I am also of the opinion that the objection taken by the defendants to the action of Fleetwood in receiving the acceptances, is well taken. I think the trustees had no authority, under the articles, to take anything but money. The complainant being a party to the articles, was bound to take notice of the nature and extent of the authority thereby given.

I assume, therefore, that the giving of the acceptances was illegal, and that the complainant did not pay his assessment as required by the articles, and the question in the case is simply one of forfeiture.

I am of opinion that the complainant at law incurred a for-

feiture of his stock, and the only question is, has the court of equity the right to relieve for such forfeiture and is a case for such relief made out by the complainant?

It is to be observed that no rights of property have become vested by reason of the forfeiture in this case. The forfeited stock has never been distributed among the shareholders, or sold as is provided for by the articles. Had such action been taken a different case would have been presented.

The articles provide no express mode by which the forfeiture is to be established. If they did, and such mode had been pursued, and especially if any right had vested in consequence thereof in third parties, the defendants' argument would have had more force. But here is a mere naked declaration that the stock is forfeited, which is all that stands in the way of the relief sought by the bill.

Courts of equity do not favor forfeitures, and it cannot be denied that the effect of a forfeiture in this case would be to inflict a heavy loss and injury upon the complainant. He would thereby lose all his interest in the increased value of a large amount of property, in a portion of which he was concerned as one of the original purchasers. The question is: Can the mere declaration of the trustees have the effect to foreclose all Walker's interest in this property? I think not. I am inclined to the opinion (although I do not put my decision of this case on that ground), that a judicial decree of foreclosure upon a bill filed by the trustee, was necessary in order to bar the rights of Walker to redeem his stock.

Having come to the conclusion then that a court of equity has the right to grant relief if a proper case is made, the remaining question is: has the complainant made out such a case?

In this view of the case, the transaction with Fleetwood is important. There is no question that this was in perfect good faith on the part of all the parties. They acted under an honest mistake in regard to their powers. The paper furnished by Walker was deemed unquestionable at the time. He left the stock as collateral. He was, as is shown, amply able to have raised the money in other ways if this agreement had not been made with Fleetwood. The trustees certainly knew of

and acquiesced in the act of Fleetwood in taking the acceptances. They gave no notice to Walker of any dissatisfaction on their part with the arrangement until long after the maturity of the acceptances.

Under such circumstances, the complainant having come in and tendered in money the whole amount due and ten per cent. interest, it would be hard and oppressive to deny him the right to redeem his stock, and I should not feel inclined to do so unless compelled by the authorities, and from such examination of the law as I have been enabled to make in the brief time I have had, I think relief may be granted.

The case of *Sparks vs. Liverpool Water Works*, 13 Vesey, Jr., 428, decided by Sir Wm. Grant, has been pressed with much force by the defendant's counsel. But I think that that case rests upon the public corporate objects of the concern. The case before me is different. It is that of a mere private land company in which the public have no interest.

This case has been likened by the counsel on the part of the complainant to that of a bill to redeem from a mortgage after forfeiture, and on the other side to a bill for a specific performance of a defaulted contract to convey, and in my opinion neither of these views are to be regarded as exactly correct. It is a case which rests upon principles peculiar to itself, and the right to relief is based upon the considerations which I have stated.

Upon payment of the whole amount due, principal and interest, the complainant should be allowed to redeem his stock, and certificates thereof should be executed and delivered to him by defendants, and decree will be entered accordingly.

Corporations may be authorized to forfeit stock; Herkimer M. & H. Co. *vs.* Small, 21 Wendell, 273; Troy Turnpike and R R. Co. *vs.* M'Chesney, Id., 296. Unless the power to forfeit stock is given by the charter, a by-law subjecting it to forfeiture is merely nugatory. Matter of Long Island Railroad, 19 Wendell, 37; Turnpike Company *vs.* Inlay, 1 Southard, 285; *In re* National Patent Steam Fuel Company, 5 Jurist N. S., 420; 28 Law J. N. S., Ch. 637. Directors cannot forfeit stock in any other way than the mode provided in the charter. Downing *vs.* Potts, 3 Zabriskie, 66. Forfeiture can only be enforced upon full compliance with the provisions of the act. Eastern Plank Road Company *vs.* Vaughan, 20 Barbour, 155.—[*Reporter.*

MYGATT vs. CITY OF GREEN BAY.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER, 1859.

1. HOLDER OF NEGOTIABLE CITY BONDS NOT BOUND TO EXAMINE CITY RECORDS.—The holder of a city bond issued to a plank road company or bearer in aid of the construction of the road, pursuant to a legislative act, is not bound to examine the records of the city to ascertain whether the resolution of the council for issuing the bonds corresponds with the resolution recited in the bonds. The recital in the bond binds the city in an action by a *bona fide* holder.

2. MAKING BONDS PAYABLE IN DISTANT PLACE DOES NOT RENDER THEM VOID.—Where city bonds are issued to a corporation or road company payable in the city of New York, without express authority of law to make them so payable, the bonds are not void for this reason, but the city is not bound to transport funds to New York for their payment.

3. PURCHASER SHOULD TAKE NOTICE OF ACT AUTHORIZING ISSUE.—The act under which the bonds are issued is the basis of the contract, and dealers in such bonds should take notice of the act, it being a public statute.

An act of the state legislature to amend the charter of the town of Green Bay, and to enable the corporation to aid in the construction of roads, approved March 7th, 1853, provided, that the corporation of said town shall be hereafter known and styled the president and trustees of the borough of Green Bay. Section 2d of said acts is, "that the president and trustees of said borough shall have authority to subscribe in behalf of said borough, to the capital stock of any rail or plank road, which is now, or may thereafter be incorporated for the purpose of constructing roads passing through, or terminating in said town, or on the Fox river opposite said borough, to the amount of one hundred thousand dollars." And by section 3, "in order to provide for the payment of the installments on the stock subscribed as aforesaid, the said president and trustees may borrow, on the faith of said borough, any sum or sums of money not exceeding in the aggregate the whole amount of

the installments to become due on such stock, at a rate of interest not exceeding eight per cent. per annum, and for a term not exceeding twenty years. And in order to provide for the payment of the installments becoming due on such stock, in case the same shall not have been provided for by law, or otherwise, and also in order to provide for the payment of the interest and principal of any loan made in pursuance of this act, the said president and trustees shall levy annually a tax on the real estate within the corporate limits of said borough not exceeding one per cent. on the assessed value of said property: *Provided*, that if in any year the exigency of the case may require it, such tax may be increased to any rate not exceeding two per cent, on such assessed value."

By an act to incorporate the Taychudah and Green Bay Plank Road Company, approved April 16th, 1852, that company was incorporated; and the city of Green Bay was incorporated by an act approved February 27th, 1854. By this act the city was made liable for the debts of the borough.

This suit is on bonds of the borough of Green Bay, for the recovery of the interest accrued, according to their condition, and coupons annexed. The bonds recite the authority given the president and trustees, by the act of March 7th, 1853, to subscribe to stock. And also, "whereas, the president and trustees of said borough at a meeting of their board, did agree by resolutions of said board to subscribe the sum of twenty thousand dollars to the stock of the Taychudah and Green Bay Plank Road Company, and that the said borough issued bonds to the amount of said subscription, to the said plank road company, and that said bonds be signed by the president and countersigned by the clerk, under the seal of the corporation. Now, *therefore*, for the purpose of carrying out the provisions of the said act of the legislature, and in accordance with the resolutions of the said board, as aforesaid, the borough of Green Bay is held and firmly bound unto the Taychudah and Green Bay Plank Road Company, or bearer, in two thousand dollars, upon the condition that the said borough of Green Bay shall pay or cause to be paid to the said Taychudah and

Green Bay Plank Road Company, or their successors or assigns, or to the bearer hereof, the just and full sum of one thousand dollars in ten years from the first day of January, 1854, with interest annually at the rate of eight per cent. per annum until paid, said principal and interest to be paid at the Bank of New York, in the city of New York." The coupons annexed are for eighty dollars each. The annual interest is payable at the Bank of New York. The bonds are signed by the president of the borough, and countersigned by the clerk under the corporate seal. The coupons are signed by the president. The following resolution of the board on the 19th of November, 1853, was read on the part of the defendant: "That the board of trustees of the borough of Green Bay, hereby authorize their committee on subscriptions to subscribe the sum of twenty thousand dollars to the capital stock of the Green Bay and Taychudah Plank Road Company, payable in bonds of the borough at seven per cent. per annum, under the act authorizing the said borough of Green Bay to subscribe to plank roads and railroads." One terminus of the road was at Green Bay. The defendant's counsel offered to prove, that the contractor received seventeen of these bonds, and that he had only made three miles of road, at a distance of sixteen miles from Green Bay, which offer was overruled as immaterial.

A verdict was taken *pro forma* for the amount of coupons due before suit brought, not adding exchange on New York. The defendant's counsel moved for a new trial.

Peckham & Bloodgood, for plaintiffs.

Howe & Beckwith, for defendant.

MILLER, J.—The two questions worthy of consideration raised on this motion are:

1st That the resolution of the board did not authorize the issuing of the bonds at a rate of interest higher than seven per cent.

2d That the act did not authorize bonds to be issued payable in the city of New York.

The resolution of the board of trustees, as recited in the bonds, does not correspond with the resolution of record, excepting in this, that twenty thousand dollars of stock in the company is authorized to be subscribed for, and that bonds be issued for the amount. The rate of interest recited in the bonds is not as prescribed by the resolution. The recital refers to a resolution directing how the bonds shall be executed. The clerk testified that there was no other resolution of the board on record but the one. It may be, there was another resolution which was not recorded. At all events it is immaterial in this suit of the holders of the bonds, whether there was such a resolution or not. The city cannot take advantage, in this suit, of the omission or neglect of the clerk. The recital in the bonds binds the borough the same as if a previous resolution had been passed by the president and trustees, and duly recorded. The city is now estopped from denying the existence of a resolution authorizing the president and clerk to execute bonds in the form of these bonds at an interest of eight per cent. The purchaser was not bound to look for the resolution.[1] The bonds are the acts of the trustees directly and not through agents.

The weight of authority sustains the principle, that when an obligation is payable at a particular place, and is necessarily sued at a place where the exchange is in favor of the place of payment, the party is entitled to recover the real difference of exchange.[2] In *Wook vs. Kelso*, 27 Pennsylvania State, 241, a suit on a note dated in Erie, Pennsylvania, payable in New York, the exchange was allowed.

The decisions against the allowance of exchange are *Martin vs. Franklin*, 4 Johnson, 125, which was an action of assumpsit for goods sold and delivered, and *insimul computassent*,

[1] Commissioners of Knox county *vs.* Aspinwall, 21 Howard, 539; The Royal British Banks *vs.* Turquand, 6 Ellis & Blackburn, 327.

[2] Story on Conflict of Laws, §§ 308 to 313, and cases cited; Story on Bills of Exchange §§150, 151, 152, and cases cited; Sedgwick on Damages, 240, and cases cited; Smith *vs.* Shaw, 2 Washington, 167; Lanusse *vs.* Barker, 3 Wheaton, 101; Woodhull *vs.* Wagner, Baldwin, 296; Lee *vs.* Wilcocks, 5 Sergeant & Rawle, 48; Grant *vs.* Healey, 3 Sumner, 523.

Schofield vs. Day, 20 Johnson, 102. It will be observed, that the courts in each of those cases contented themselves with a *per curiam* opinion without any examination of authorities or precedents, and also *Adams vs. Cordis*, 8 Pickering, 260. These bonds would on their faces entitle the holders to the exchange between Green Bay and New York, in addition to the debt and interest.

The legislative act authorized the president and trustees of the borough of Green Bay, "to borrow on the faith of said borough, at a rate of interest not exceeding eight per cent. per annum. The condition of the bonds is for the payment of the principal and interest at the rate of eight per cent. at the bank of New York, in the city of New York. The act did not expressly authorize the issuing of bonds, but it is reasonable to suppose it was contemplated that some security or evidence of debt should be given by the president and trustees for the money borrowed. The bonds were given to the company for stock subscribed, and according to the modern system of financiering, they were put into negotiable shape, so that money could be raised on them for the prosecution of the work. By the law the principal and interest on these bonds are to be paid out of taxes assessed upon the real estate of the inhabitants of Green Bay.

In the case of the *Commissioners of Knox County vs. Aspinwall*, 21 Howard, 539, the act authorized bonds to be issued, redeemable at such time and place as the directors of the company may determine. The bonds were made payable in the city of New York, to the Ohio and Mississippi Railroad Company, or bearer, for stock in said company. There was express lawful authority for issuing these bonds.

These bonds, on their face, import a compliance with the law under which they were issued.

"The act under which the bonds were issued is a public statute of the state, and the person dealing in them is chargeable with a knowledge of it, and as the board was acting under delegated authority, he must show that the authority has been properly conferred." In reading the act, under which the

bonds in suit purport to be issued, he will not find express authority to issue bonds, nor any authority, express or implied, to issue them payable in the city of New York, where the exchange is uniformly against Green Bay. The purchaser of these bonds might properly consider them nothing more than a certificate under the corporate seal of the borough, signed by the president, and countersigned by the clerk. They are in substance nothing more.

The borough of Green Bay, instead of borrowing money to pay installments on the stock, issued bonds direct to the Plank Road Company.

The company thus became the creditor of the borough, instead of some person from whom the money might have been borrowed, and it received the bonds as cash in payment of the subscription. It was attempted to be proved, at the trial, that the borough never received the certificates of stock, but proof was not to be received to affect the bonds in the hands of these plaintiffs, for the neglect of the corporation in not obtaining the certificates, could not be a reason for not paying the bonds. The city is entitled to the certificates of stock for which the bonds were given, and can recover them, or damages for their amount on demand.

Giving the bonds to the plank road company cannot be now made an objection on the part of the city, even if it were not according to the literal terms of the act. The borough preferred this mode of carrying out the provisions of the act, and either received an equivalent, or a supposed equivalent for the bonds, or is entitled so to receive it on demand. Under the act it could have borrowed the money, and paid the subscription in installments, or paid the whole amount in advance, or given its bonds for the whole amount. Either proceeding would be a substantial compliance with the act. And having preferred the latter mode, a defense to the payment of the bonds and interest, based upon technical grounds, is not to be favored. In the case of the *City of Bridgeport vs. The Housatonic Railroad Company*, 15 Connecticut, 475, the bonds were made payable in the city of New York, without express authority of

law. That was not made a point of defense. The defense was, that the interest on the bonds was payable semi-annually when it was directed to be paid annually. The court held it was not such a material violation of the authority for issuing the bonds, as to invalidate them, particularly as the freemen of the city afterwards approved them. The rate of exchange between New York and Bridgeport was probably so nearly balanced, and the expenses of transporting the money to New York, so trifling—that this objection was probably not thought worthy of consideration.

A note payable generally is a different instrument from one given by the same parties for the same amount, payable at New York. The rate of interest, the exchange, and the place of demand are controlled by the place where it is payable. Nor will a note payable at a particular place be received on a declaration, in which the place of payment is omitted.[1] In this case the rate of interest is prescribed in the bond. And no demand is necessary. But the rate of exchange between Green Bay and New York, or the expense of transporting funds from Green Bay to New York, is so considerable in amount as greatly to enhance the amount of debt. It is evident that the act did not authorize the loans or debts to be contracted on this condition. But shall the bonds be adjudged void for this reason? It was the duty of the plaintiffs to examine the act, and there they would not see any authority for contracting the loan or debt on this condition.

After much reflection upon the subject, I have come to the conclusion, that the interest on the bonds is recoverable, but not with exchange on New York, as the act did not authorize the loan or debt to be contracted on that condition. The act controls the extent of the obligation. That part of the condition of the bonds is not binding on the city, as a part of the contract under the act, and the property in the city should not be taxed for its payment. The holder of such bonds and coupons cannot require the city of Green Bay to pay in the

[1] Sebree *vs.* Dorr, 9 Wheaton, 558; Covington *vs.* Comstock, 14 Peters, 43.

city of New York. I think the bonds are a lawful debt of the city, with annual interest at the rate of eight per cent.

The motion for a new trial will be overruled.

The holder of coupon bonds payable to bearer but referring to act under which they were issued, is chargeable with knowledge of its provisions, and the construction to be placed upon them by the courts. Commonwealth *vs.* Chesapeake, &c., Canal Company, 32 Maryland, 501.

County bonds payable absolutely to bearer are good in hands of *bona fide* holder, although restrictions in statute have been disregarded. Wood *vs.* Alleghany County, 3 Wallace, Jr., 267; San Antonio *vs.* Lane, 32 Texas, 405.

Bona fide purchaser without notice of a suit pending to cancel the bonds, not prejudiced. Durant *vs.* Iowa County, 1 Woolworth, 69.

Want of power to issue bonds is a good defense, even against a *bona fide* holder. Treadwell *vs.* Commissioners, &c., 11 Ohio State, 183; Mercer County *vs.* Hackett, 1 Wallace, 83; Starin *vs.* Genoa, 23 New York, 439; Marsh *vs.* Fulton County, 10 Wallace, 676; Aspinwall *vs.* Commissioners of Daviess County, 22 Howard, 364; Gould *vs.* Town of Sterling, 23 New York, 456; Hill *vs.* Manchester Water Works Company, 5 Barnewall & Adolphus, 866; Aurora *vs.* West, 22 Indiana, 88; Marshal County *vs.* Cook, 38 Illinois, 44; Clay *vs.* County, 4 Bush, 154.

Mere irregularities, however, do not vitiate them. Thompson *vs.* Lee County, 3 Wallace, 327; Gelpcke *vs.* City of Dubuque, 1 Wallace, 175; Moran *vs.* Commissioners, &c., 2 Black, 722; Maddox *vs.* Grigham, 2 Metcalf, 56; Butz *vs.* Muscatine, 8 Wallace, 575; Van Hostrup *vs.* Madison City, 1 Wallace, 291; Commissioners of Knox County *vs.* Aspinwall *et al.*, 21 Howard, 537; Woods *vs.* Lawrence County, 1 Black, 386; Bissell *vs.* Jeffersonville, 24 Howard, 287; Butler *vs.* Dunham, 27 Illinois 474; Mercer County *vs.* Hackett, 1 Wallace, 83; Commissioners, &c., *vs.* Nichols, 14 Ohio State, 260; Mayer *vs.* The City of Muscatine, 1 Wallace, 384; Rogers *vs.* Burlington, 3 Wallace, 654.

The Supreme Court has lately held recitals in bonds, issued by supervisors under an act of the legislature, binding upon the county as against *bona fide* holders, and that want of compliance with the forms of law, or fraud by the agents of the county, could not be shown in defense. Town of Grand Chute *vs.* Winegar, Chicago Legal News, April 12, 1873.

Compare also Luling *vs.* City of Racine, *post* p 314; Goedgen *vs.* Supervisors of Manitowoc County, June Term, 1870, and Schenck *vs.* Supervisors of Marshall County, October, 1866, to be reported in subsequent volume of these Reports.—[*Reporter.*

HUSSEY vs. McCORMICK.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—SEPTEMBER, 1859.

IN EQUITY.

1. The invention of Obed Hussey, under his patent of August 7, 1847, and re-issued in 1857, consisting of a vibrating scalloped cutter, combined with slotted guard-fingers fastened in front and open in the rear, held valid.

2. It is immaterial whether such opening be placed below or above the cutter, as the patent makes no such distinction.

3. Nor is it material that the scallops upon the cutter should be of any particular depth, or that the angle they make should be greater or less. A right which may be lost by the variation of an angle can be of no value.

4. The legal presumption is, from the action of the Patent Office, that the re-issued patent is for the same invention as the original patent.

5. Differences in the claims are consistent with the identity of the thing designed to be patented in both patents, it being one object of the surrender to correct by changing the description, or claim, or both.

This was a bill in equity, filed to restrain the defendants from infringing letters patent granted to complainant, August 7, 1874, for "improvements in reaping machines," which letters patent were surrendered, and three several patents, numbered 449, 450, and 451, were re-issued April 14, 1857, for distinct and separate parts of the thing originally patented. The defendants were charged with the infringement of reissue No. 449.

The specification of the original patent was as follows:

"Be it known, that I, Obed Hussey, of the city of Baltimore, and State of Maryland, have invented a new and useful improvement on the reaping machine invented by me, and patented in 1833, and I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part of the specification in which Fig. 1 is a

bird's eye view of the cutting apparatus, in which AAAAAA represent the vibrating cutting-blades; BBBBBB the permanent guard-irons; H represents a part of the wood-work. The guards are formed of a lower piece and an upper piece, admitting the blade to pass between in cutting, so that the straw, grass, hemp, corn, &c., which comes in between the guards to be cut, is firmly supported, both above and below the vibrating blades.

"In my original invention, the upper part of the guards were fastened to the lower part, both before and behind the blades, as represented at CCCC; the grass, straw, etc., which is not perfectly cut is forced in by the motion of the blades, and works back between the blades and the upper piece of the guards, materially obstructing the free movement of the blades; in wet weather frequently causing what the farmers call choking. The improvement for which a patent is now asked is represented at DDDD, where the upper piece of the guard is fastened to the lower piece only at the point, leaving the back end unconnected, consequently the space between the upper and lower pieces of the guard through which the blades vibrate is open behind, so that the grass, etc., which is forced in by the action of the blades, now passes freely out through the opening; which opening, when used in combination with vibrating blades, constitutes a claim in this improvement, and is represented at DDDD, Fig. 1, and at A, Fig. 3.

"My improvement extends also to the prevention of the accumulation of grass, etc., under the blades, which I will describe as follows: In my original invention, the blades are ground with a bevel on both sides of the edge; the purpose of this is, that, by means of the shoulder of the bevel, the sharp edge is prevented from coming in immediate contact with the iron in passing the guard.

"This bevel is not so necessary near the fork of the blades as near the points, hence, in this improvement, about one inch of edge, at the fork, is flush on the upper side, leaving the bevel all on the upper side. The design of this is that the grass, etc., which is forced in between the blades and the lower part of the

guard, shall be cut up and worked out by the flush edge acting close to the iron at the fork. This latter improvement is also claimed as new, in its application to the particular purpose for which it is designed.

"Figure 2 is a sectional view of one of the guards in my original invention. A is a part of the wood-work as seen at H, Figure 1.

"Figure 3 represents one of the guards containing the improvement before described. A is the opening; B, part of the wood-work.

"Figure 4 represents a view of one of the blades with the flush edge (EE) on each side of and at the fork of the blades, (A 1.)

"I accordingly claim the opening above the blades at A, Figure 3, and at D, Figure 1, in combination with vibrating blades.

"I also claim the particular application of the flush edge at the fork of the blades, for the purpose described. The end and design of the improvements above claimed, is to prevent the blades choking. OBED HUSSEY."

The description of the invention in reissue 449, was substantially the same as that contained in the original patent. The only material differences consisted in the addition of the following paragraphs, and in the claims.

"Reaping machines have heretofore been constructed, some with straight blades with smooth edges and having a rotary motion, in which the cutters were arranged to work through slots between the upper and lower parts of guard-fingers, which parts were connected only at the front ends. In such machines the fingers acted: 1st, As guards or protectors to prevent the edge of the cutter from being injured by collision with stones or similar obstacles; and 2d, like the teeth of a comb, to divide the stalks of grain or grass while being cut, into narrow strips or parcels and hold them from leaning to the right or left, as the edges of such cutters were borne forward against the stalks, and drawn across to cut them. It is evident that in such a cutting apparatus, the blades, if smooth edged, cut

like a knife, or, if sickled, like a saw, without the aid of another edge, between which and the edge of the blade, the stalks may be sheared or clipped. But in machines in which the cutter has a scalloped edge, the fingers serve three purposes: first, they act as protectors to the edge; secondly, they divide and hold up the stalks; and thirdly, they act as fixed shear blades, between which, and the edges of the scallops, the grain or grass is clipped. But the shearing or clipping action tends to force the stalks crosswise of the finger into the slots, so that in such machines the slots, between the upper and lower parts of the fingers, through which the scallops play, are liable to clog or choke, either impeding or wholly preventing the cutting action of the machine; by reason of this tendency of the scalloped sickle to force the stalks across, and thus entangle them upon the fingers, all the modes heretofore devised, of working this sickle were comparatively ineffective.

"But as the scalloped blade is, in my judgment, the best of all cutters, it is of great importance to overcome every impediment to its successful working, which I have done in the manner before described, viz., by combining with it a slotted finger, the upper and lower parts of which are connected with each other only at the points, and one part only being attached to the frame of the machine, leaving an opening at the rear of the slot, through which the clogging matter can work its way out.

"I claim as my invention the combination of a vibrating scalloped cutter, the indentations of whose edge act as a series of moving shear blades, with slotted guard-fingers, the sides of which act as a corresponding series of fixed shear blades, the parts of such fingers forming the slot, being connected at the front ends only, leaving the rear of the slot open and free for the escape of material that would otherwise clog the cutter, substantially as described.

"In testimony whereof, I have hereunto subscribed my name. OBED HUSSEY."

The defendants denied that Hussey was the original invent-

or of the improvement claimed, and insisted that C. H. McCormick was the original and first inventor thereof. They also insisted that they did not infringe the reissued patent, because the slot in the finger, used by McCormick, was open below the cutter, whereas in the patent the opening was above; also, because the McCormick cutter was not so deeply scalloped as the Hussey cutter; and also because the reissued patent was not for the same invention as that for which the original patent was granted.

P. H. Watson and *Geo. Harding*, for complainant.

Goodwin & Larned and *Chas. M. Keller*, for defendants.

McLean, J.—The complainant states in his bill that prior to February 17th, 1847, he was the first and original inventor of certain new and useful improvements in reaping machines; and that letters patent were granted to him therefor, bearing date August 7th, 1847. That said letters patent were surrendered for insufficient specification, and three several patents dated April 14, 1857, were reissued for distinct and separate parts of the thing originally patented, pursuant to the Act of Congress of March 3d, 1837.

That the defendants have constructed machines since the date of the reissued patent, in violation of one of the reissued letters patent, numbered 449.

Hussey says: "I claim as my invention the combination of a vibrating scalloped cutter, the indentations of whose edges act as a series of moving shear blades, with slotted guard-fingers, the sides of which act as a corresponding series of fixed shear blades; the parts of such fingers forming the slot being connected at the front ends only, leaving the rear of the slot open and free for the escape of material that would otherwise clog the cutter, substantially as described."

This combination is so succinctly and clearly expressed, that no one can mistake it. A vibrating scalloped cutter, combined with slotted guard-fingers, fastened in front and open in the rear, constitutes the invention. The cutter operates through

the slots in the guard-fingers, and they, being fastened in front and open in the rear, permit the material which accumulates to escape.

And the defendants admit in their answer: "If the claim of the reissued patent, No. 449, should be so construed as to cover the employment of a vibrating scalloped-edge cutter, of any kind, in combination with slotted guard-fingers with the opening for the discharge of the material that would otherwise clog the cutter, whether such opening be placed above or below the cutter, then the defendants, further answering, admit that the defendant, Cyrus H. McCormick has long prior to and since the 14th of April, 1857, manufactured and sold large numbers of reaping machines involving the combination so claimed and construed; and that he has now on hand, completed and for sale, a small number of such reaping machines."

This admission is made on the hypothesis that the court shall construe the claim to be for a vibrating scalloped cutter of any kind, in combination with slotted guard-fingers, with the opening for the discharge of material that would otherwise clog the cutter, whether such opening be placed below or above the cutter.

As stated, the admission is made in the language of the patentee, with the exception of the words, "whether such openings be placed below or above the cutter;" but as these words were not used by the patentee, it is difficult to see how they can affect his rights. The call is for slotted fingers, the parts forming the slots being connected at the front ends only, leaving the rear of the slot open and free. If the slot be open and free in the rear, it would seem that there can be no obstruction to the cutter by the clogging matter. "Whether the opening be placed above or below the cutter," is not in the case. It is both below and above the cutter, and unless some new rule shall be found, which shall enable the defendant to modify the claim of the plaintiff, we suppose it must stand.

In their further answer the defendants allege that Hussey is not the original and first inventor of such improvement, but long prior to the invention by him, substantially the same con-

struction and combination was invented and described in letters patent granted to Cyrus H. McCormick, which letters patent are dated June 21, 1834, and that the machines were in use long prior to the invention of the complainant.

In answer to this, it is only necessary to say, that an inspection of McCormick's patent of 1834 will show that it contains no such combination of a vibrating scalloped cutter with slotted guard-fingers fastened at the front only, leaving the rear open and free, as called for by the complainant in his reissued patent of 1857. The cutting apparatus described in McCormick's patent of 1834 was a "vibrating straight-edge sickled blade," stated to be, "a long cutter of steel grooved or notched on its lower edge like a reaping hook, with the grooves running in a line toward the right of the machine."

This cutter, in form and principle, was unlike the scalloped cutter of Hussey, to say nothing of the other parts of the machine, or of the combination claimed and so clearly described by him.

The same remark will apply to the alleged improvement of McCormick, in 1840 or 1841. That consisted of "a vibrating cutter with a straight edge, and with the sickle teeth cut therein in sections, and inclined in opposite directions." Whether this improvement had been the subject of experiment, and machines with the improvement had been sold to various persons in 1840–42, can be a matter of no importance, as it was wholly different from the right of the plaintiff. These machines, with "wooden slotted fingers," as appears from the evidence, were abandoned by McCormick, and simple unslotted fingers were substituted in their place. But not one of his experiments, however numerous they may have been, seems to have reached the organization and effect of the plaintiff's machine, until, by his own admission, he adopted its principles.

If anything in addition to this testimony be necessary, it is found in the testimony of Henry B. Renwick. He was a principal examiner in the Patent Office a number of years, and for the last four or five years United States Inspector of Steamers in the port of New York. He states that on exam-

ination of the defendant's machine, with the reissued patent No. 449, he finds it is a substantial representation of the invention set forth in the patent, and that the variations are formal and not substantial. Neither the science nor the practical knowledge of this witness is controverted. His statement stands uncontradicted.

It is objected that the scallops used by McCormick in his cutting apparatus have less depth than those used by Hussey. This is a formal and not a substantial objection. The scallops were not required to be of any particular depth, or that the angle they make should be greater or less. This was necessarily left to the knowledge and experience of the mechanic. Practical utility was the end to be attained in the use of the scalloped cutter. Some mechanics may prefer one angle, some another. A right which may be lost by the variation of an angle, can be of no value.

The cutting operation of Hussey is done by shears, which cut the substance presented at an angle, and which many prefer to the sickle-edge cutter. Whether the cutting is done by the one or the other instrument, it is rightly denominated the scalloped cutter.

The objection that the sole purpose of the surrender and reissue of the complainant's patent was to cover what Hussey had not invented and which he knew to have been previously invented and constructed by McCormick, does not seem to accord with the admission of the defendants, that if the claim should be sustained as made, they have manufactured and sold since April 14, 1857, a great number of reaping machines, involving the combination so claimed and constructed.

The legal presumption is, from the action of the Patent Office, that the reissued patent is for the same invention as the original patent; *O'Reilly vs. Morse*, 15 Howard, 62; and in that case it was held that "differences in the claims are consistent with the identity of the thing designed to be patented in both patents, it being one object of surrender to correct by

changing the description, or claim, or both. This is the well settled doctrine of the Supreme Court." [1]

In their answer the defendants admit "that the letters patent of August, 1847, were surrendered, and that thereupon three several patents were granted April 14, 1857, to Hussey; each for a separate part of the reaping machine described in the surrendered letters patent."

In the patent of 1847, a combination of the scalloped cutter with a slotted finger connected at the point and open at the rear, was represented. The description in the reissued patent is more concisely and clearly expressed; but the identity of the invention plainly appears. The corrected phraseology is clearly within the provisions of the patent law.

A repetition of the elements of Hussey's invention and their combination could add no strength to what has been said in regard to his improvement. There is no ground on which to question his good faith in making a surrender of his patent, and procuring three several patents, each for a separate part of the reaping machine described in the surrendered letters patent.

Nor is there any evidence of a just pretension on the part of C. H. McCormick, that he was the original and first inventor of the improvement claimed by Hussey. In the absence of all evidence as to the want of novelty in this invention, we may well conclude that Hussey was the inventor, and that he is entitled to damages for a violation of his patent, and to an injunction.

As Cyrus H. McCormick, from the facts alleged and admitted in the answer, is the person responsible to the complainant, the other two defendants being his employes, the bill will be dismissed as to them, and the case will be referred to a master, who will take an account, etc., under the directions of the counsel of the complainant, subject to the objections which may be made by the defendant's counsel.

Drummond, J., concurring.

[1] Batlin *vs.* Taggart, 17 Howard, 74.

UNITED STATES vs. BARNEY SWEENEY.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—OCTOBER TERM, 1859.

1. ACT OF FEBRUARY 18, 1793—HOW EXTENDED.—The act of March 2d, 1831, regulating the foreign and coasting trade on the Northern, North-eastern, and North-western frontiers, in effect extended the act of February 18, 1793, to the Western Lakes.

2. REVENUE LAWS—WHAT VESSELS MUST OBSERVE.—Whenever a vessel was enrolled or licensed under this act of 1831, it became under the protection of the laws of the United States, and bound to observe the revenue laws.

3. DISTILLED SPIRITS—DUTIES REMOVED.—In the act of February 18, 1793, domestic distilled spirits are placed in the same category with articles of foreign growth or manufacture, they being at that time subject to tax, and the object of the act being the protection of the revenue. But by act of April 6, 1802, this tax on spirits having been discontinued, the object of the provisions of the act of February 18, 1793, so far as they relate to domestic distilled spirits is superseded, and the requirements of the act in regard to them are no longer to be enforced.

4. The distilling of liquors in the United States having been left entirely free of duty, the spirits became as free an article of commerce as any other article of domestic manufacture.

Declaration in debt for a penalty. It charges that the defendant was the master or commander of a steamboat called the Traveller, licensed for carrying on the coasting trade; and that he navigated said boat and arrived with said boat from a district in one state to a district in an adjoining state on a navigable river and water communication, to wit: from the port of Chicago in the State of Illinois, to the port of Milwaukee in the State of Wisconsin. And that the defendant on his arrival at the port of Milwaukee from the port of Chicago, had on board more than five hundred gallons of distilled spirits in casks, to wit: thirty barrels of alcohol, which he had brought on said boat from the port of Chicago. And the defendant did, at Milwaukee, unlade said distilled spirits without delivering to the

collector a manifest of the cargo of said boat, certified by either the collector or surveyor of the district of Chicago, or any duplicate manifest of said cargo, and before and without offering to affirm or swear to any such manifest, and before and without having a permit to unload any part of said cargo. And he neglected and refused to deliver any manifest of the cargo of said boat, to the collector at Milwaukee, at the time and in the manner directed by the act of Congress, approved February 18, 1793, entitled, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, &c."[1]

The defendant demurred to the declaration.

D. A. J. Upham, U. S. District Attorney, for the United States.

H. W. Blodgett, for defendant.

MILLER, J.—The declaration is drawn under the fifteenth section of the act of February 18, 1793, which directs, "that the master or commander of every ship or vessel licensed for carrying on the coasting trade having on board either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, &c., * * * or foreign merchandise in packages as imported, exceeding in value four hundred dollars in goods, wares or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, and arriving from a district in one state at a district in the same, or in an adjoining state, on the sea coast, or on a navigable river, shall previous to the unlading of any part of the cargo of such ship or vessel, deliver to the collector, &c., the manifest of the cargo certified by the collector or surveyor of the district from whence she sailed, &c. Whereupon the collector or surveyor shall grant a permit for unlading, &c. And if the master shall neglect, &c., he shall pay one hundred dollars." It is provided in section eighteen of the act, "that

[1] 1 United States Statutes at Large, 305.

nothing in this act contained shall be so construed as to oblige the master or commander of any ship or vessel licensed for carrying on the coasting trade, bound from a district in one state, to a district in the same or an adjoining state, on the sea coast, or on a navigable river, having on board goods, wares, or merchandise of the growth, product, or manufacture of the United States only, (except distilled spirits), or distilled spirits not more than five hundred gallons, &c., (the articles as enumerated above,) in section 15, to deliver a manifest thereof or obtain a permit previous to her departure, or, on her arrival within such district to make any report thereof; but said master shall be provided with a manifest, by him subscribed, of the lading of what kind soever, which was on board such ship or vessel at the time of his departure from the district from which she last sailed; and if the same, or any part of such lading consists of distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture, with the marks and numbers of each cask, bag, box, chest, or package, containing the same, with the name of the shippper and consignee of each, which manifest shall be by him exhibited for the inspection of any officer of the revenue, when by such officer thereunto required."

Two points are presented by the demurrer.

1. That the operation of the act is restricted to the sea coast and navigable rivers.

2. That the act has particular reference to the protection of a revenue arising from internal duties on domestic distilled spirits, which was subsequently discontinued.

"An act to regulate the foreign and coasting trade on the northern, north-eastern and north-western frontiers of the United States, and for other purposes," approved March 2, 1831, 4 Statutes at Large, 487, in effect extended the act of February 18, 1793, to these lakes. The third section is, " that from and after the passage of this act, any boat, ship, or other vessel of the United States, navigating the waters on our northern, north-eastern and north-western frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the Secretary of the Treasury, which enrollment and license

shall authorize any such ship, or other vessel, to be employed either in the coasting or foreign trade; and no certificate of registry shall be required for vessels so employed on said frontiers."

Whenever a vessel was enrolled or licensed under this act, it became under the protection of the laws of the United States and bound to observe the revenue laws. A vessel arriving at the port of Detroit, or any other port in a navigable river, connecting the lakes, would come literally under the requirements of the act of February 18, 1793. Lake Michigan is not a navigable river, but I do not think that such a strict construction should be put on the act as contended for on behalf of the defendant. This is a suit for the recovery of a penalty for the violation of a duty, official in character, required of the master by the legal conditions of the license under which he navigated his boat. But although this is an action for a penalty, yet the intention of the legislature must govern; and the act should not be construed so strictly as to defeat the obvious intention of the legislature.[1]

In addition to the above quotation from section eighteen of the act of February 18, 1793, it is further provided in said section, "And if the master of such ship or vessel shall not be provided, on his arrival within any such district, with a manifest, and exhibit the same as herein required, if the lading of such ship or vessel consist wholly of goods, the produce or manufacture of United States, (distilled spirits excepted,) he shall forfeit twenty dollars; or if there be distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture on board, excepting what may be sufficient for sea stores, he shall forfeit forty dollars; and if any of the goods laden on board such ship or vessel, shall be of foreign growth or manufacture, or of spirits distilled within the United States, so much of the same as may be on board such ship or vessel, and which shall not be included in the manifest exhibited by such master, shall be forfeited." This provision, as well as the whole act, places domestic distilled spirits in the same category with

[1] United States *vs.* Wiltburger, 5 Wheaton, 76.

articles of foreign growth or manufacture. The object of the act was for the protection of the revenue.

Duties on spirits distilled within the United States were imposed by the act of Congress, approved March 3, 1791, 1 Statutes at Large, 199, and collected under the management of the supervisors of the revenue. Before the spirits could be removed from the distillery, the casks were to be branded; and those not branded were liable to forfeiture. And an act concerning the duties on spirits distilled within United States, approved May 8, 1792, 1 Statutes at Large, 267, further regulated the duties on domestic distilled spirits. Those duties were recoverable by virtue of these acts at the date of the act of February 18, 1793, under which this suit is brought, and explain the reason for incorporating distilled spirits in the several sections of said act with foreign articles. If no duties were collectible, spirits distilled in the United States would not have been included in the description of articles in the several sections of the acts. By an act to repeal the internal taxes, approved April 6, 1802, 2 Statutes at Large, 148, the internal duties on stills and domestic distilled spirits are discontinued, and all acts and parts of acts whatever relative thereto are repealed. The several provisions of the act of February, 1793, seem to have particular reference to the protection of a revenue which is repealed and discontinued. The object of the provisions of the act, so far as they relate to domestic distilled spirits, is superseded or annulled by the act discontinuing the duties; and these requirements of the act in this particular one are no longer to be enforced. The repealing act of April 6, 1802, left the distilling of liquors in the United States as free of duties as the manufacturing of any other article; and virtually left spirits distilled within the United States as free an article of commerce as any other article of domestic manufacture. The penalties prescribed by the act of February 18, 1793, as claimed in the declaration, should not therefore be recovered.

For this reason the demurrer will be sustained.

LULING vs. CITY OF RACINE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—APRIL, 1860.

1. LAW AUTHORIZING CITY TO ISSUE BONDS, NOT A GENERAL LAW—BONDS VALID THOUGH ACT PUBLISHED AS PRIVATE ACT.—Where the constitution of a state requires that all general laws shall be published before going into effect, a legislative act authorizing a city to issue bonds for stock in a railroad company, is not a general law within the constitutional provision, and the bonds are valid, although the act was not published before they were issued, and then in the volume of private and local acts.

2. The city issuing such bonds in pursuance of the act cannot controvert the constitutional power of the legislature to declare, in the body of the act, that it shall take effect immediately after its passage.

3. PAYMENT OF INTEREST, &C., AFFIRMANCE OF BONDS.—Where the city authorities paid the interest on the bonds for several years, and the inhabitants of the city elected commissioners to represent the stock received for the bonds, while they were passing as promissory notes payable to bearer, such acts are in affirmance of the bonds in favor of a *bona fide* holder, and he was not bound to look further.

4. An act authorizing a city to issue bonds payable in twenty years, allows the city to make the bonds payable in twenty years from the act, and the bonds are valid, although not made payable twenty years from their date.

At the trial of this cause it was shown that the Legislature of this state passed an act, entitled, "An act to authorize the city of Racine to aid in the construction of certain railroads," approved February 10, 1853, and authorizing the city council to borrow on the credit of the city, three hundred and fifty thousand dollars for twenty years, in such sums as they might deem proper, on interest not exceeding seven per cent., payable annually in the city of New York, for the purpose of investing three hundred thousand dollars of the same in the capital stock of a railroad company, authorized to construct a railroad from the city of Racine westerly towards the Mississippi river, and fifty thousand dollars to the capital stock of a company authorized to construct a railroad on the shore

of lake Michigan, or, in case the money should not be borrowed, to subscribe for so many shares of the capital stock of those companies in the proportion above named, and pay for the same in the bonds of the city, payable as above stated. The shares of the stock in the said railroad companies, and the dividends arising from them, were pledged for the payment of the principal and interest of the city bonds. The city council shall annually levy a tax upon the taxable property of the city, sufficient to pay the interest of such bonds, after deducting the dividends due the city on the shares of stock. The legal voters of the city, at each annual election, shall choose one railroad commissioner, who shall attend the annual meeting of the stockholders of said corporations, for the election of directors thereof, and shall be entitled to cast one vote for every share of stock which said city shall hold in said corporations, respectively. And this act shall take effect immediately.

The act was first published in the month of October, 1853, in the volume of private and local acts, passed by the legislature of Wisconsin, in the year 1853. A resolution of the common council, authorizing the issue of bonds to the Racine and Mississippi Railroad Company, in pursuance of the act, was read. The bonds bear date March 15, 1853, and it was proven that they were all issued by the month of May following. The bonds are payable on the tenth day of February, 1873, to the Racine & Mississippi Railroad Company, or to the holder thereof, at their office in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable annually on the tenth day of each February thereafter, for stock subscribed by the city in the said company. And the company agrees that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of a hand payable to bearer. The mayor of the city annexed certificate to each bond that it was issued by the city, in pursuance of a special act of the Legislature of the state of Wisconsin, entitled "An act to authorize the city of Racine to aid in the construction of certain railroads," approved February 10,

1853, and by an unanimous vote of the city council of said city, passed March 15, 1853.

Appended to each of said bonds are coupons, signed by the mayor of the city, for seventy dollars each, for the payment of the annual interest. The coupons for the interest payable in the years 1854, 1855, 1856, 1857 and 1858, were detached from the bonds. This suit was to recover the contents of the coupons payable in February, 1859, on thirty of the bonds. The bonds are not indorsed. It was conceded that the stock was issued and the railroad commissioners were elected to represent the city at the annual elections of the railroad company.

It was contended at the trial that the bonds were illegal, and not binding on the city, as the act of the Legislature had not been previously published, and because they are made payable before twenty years. The court, *pro forma*, overruled these points and directed the jury to find a verdict for the amount of the face of the coupons.

Motion for new trial.

Strong & Fuller, for plaintiff.

A. W. Farr, for defendant.

MILLER, J.—The Constitution of this state directs that "The Legislature shall provide by law for the speedy publication of all the statute laws, and of such judicial decisions made within the state as may be deemed expedient. And no general law shall be in force until published." The Legislature did provide by law for the publication of all the statutes or acts, and in pursuance of the law, the act in question, with similar acts, was published. The act is particularly stated on the face of the bonds, by the certificate of the mayor, to be the authority under which they were issued by the city, and on the faith of the act in force immediately after its passage, the plaintiff purchased them.

Under the authority of the case of the *Board of Commissioners of the County of Knox vs. Aspinwall*, 21 Howard,

539, the city is concluded by its representations on the face of the bonds, in regard to its authority for issuing them, and cannot go behind them, to show irregularities in the preliminary proceedings required by the act. In the opinion, the court says, "The act in pursuance of which the bonds were issued is a public statute of a state, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it, and as the board were acting under delegated authority, he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determing this question, and upon looking into it we see that full power is conferred upon the board to subscribe for the stock and issue the bonds." And it is there decided that the purchaser of the bonds was not bound to look further for evidence of a compliance with the conditions to the grant of the power. In the case of the *Royal British Bank vs. Tarquand*, cited in the opinion, the court says: "We may take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute, and the deed of settlement. But they are not bound to do more." I do not think that the Supreme Court intended, by the words "public statute," to convey the idea that the act under which the bonds were issued was a general law affecting the whole people of the state, but a statute publicly passed by the legislature, according to the constitution of the state.

It is the duty of courts to enforce statutes, as prescribed by the law-making power, and to put such construction upon them as will carry into effect their object. It must be a very clear and unequivocal case, to induce a court to pronounce an act of the legislature unconstitutional or invalid. It is by no means the duty of a court of justice so to construe a statute as to retard its operation, or to affect contracts made in pursuance of it. The universal practice of the state government has been to consider acts similar to the one under consideration of the character of special acts in force from and after their passage, and to publish them according to the law, for

that purpose, in the volume of local or private acts. And the general opinion of jurists and citizens is, that legislative acts similar to this one are grants of power to municipal corporations for local or special objects, and are not general laws affecting the whole people of the state. But in my opinion the question attempted to be raised cannot be considered a legitimate matter of defense. The obligor in the bonds cannot contest, by plea or otherwise, the constitutional power of the Legislature to declare in the body of the act, that it shall take effect immediately after its passage. The Legislature passed the act, and the state authorities published it, as a private local act. The law-making power of the state has concluded the question.

The act carried on its face all the legislative forms and requirements of a valid and constitutional statute, in force from the day of its passage.

The Legislature passed the act as a private or local act, to take effect immediately, and not from its publication.

As such private act, the people and authorities of Racine accepted it. As such, the city council unanimously authorized the bonds to be issued, in pursuance of its authority. And the mayor and city clerk issued them under the corporate seal. The plaintiff was not bound to look beyond the act.

Even if the act should be considered by the court to be a general law, in the sense of the constitution, affecting the whole people of the state, and which should have been published before going into effect, contrary to the legislative declaration and intention, yet the contract was entered into by the city with this plaintiff, under a law acknowledged by all parties to be valid at the time this plaintiff parted with his money. This plaintiff is before the court as a *bona fide* holder of the bonds and coupons, for a valuable consideration, innocently paid on the faith of the validity of the act, and the court cannot, by a technical construction of the act, release the city from the payment of a just debt. Under the authority of the act, the city issued the bonds, and on the faith of it the plaintiff purchased them, and the court will not allow a supposed technicality to defeat the recovery of a debt thus honestly

contracted. If the question here attempted to be raised were available, any tax-payer of the city, by a proper application to the Circuit Court of Racine county, might have restrained the city from issuing the bonds.

I disclaim any conflict in this opinion with decisions of the Supreme Court of the state, as contained in manuscript opinions of judges of that court.

That court, in those cases, considered the matter then decided a legitimate defense, which this court does not. It is not unusual for the courts of the states and of the United States, to disagree in their rulings. The rules of practice and the principles controlling the action and decisions of the different courts are in many instances very dissimilar, and in no respect binding on each other. It is the approximate duty of the Supreme Court of the state to construe the Constitution and statutes of the state, and it is the bounden duty of this court to adopt such construction, in cases involving or requiring it, but not where the construction, contended for on behalf of a party, is not recognized as a legitimate matter of defense.

The act was approved February 10th, 1853, and the coupons are payable on the 10th of February in each year. The bonds bearing date March 15, 1853, did not allow twenty years, nor one full year, for the first year's interest to run. This is not a suit for the principal of the bonds, nor for the first year's interest, and consequently that objection to these bonds is not tenable.

The city authorities put their own construction upon the act, and carried it out by issuing bonds as they did, and approved their acts by paying the annual interest on the bonds for several years after the publication of the act, and receiving certificates of stock of the railroad company as consideration for the bonds.

And as the people of the city approved of all this by electing commissioners, under the act, to represent the stock thus received for the bonds, at the annual elections of the company, while the bonds were in circulation as promissory notes, pay-

able to bearer; I think they should not be permitted to object to the validity of their own acts. The people of the city of Bridgeport confirmed similar bonds to these.[1]

The motion for a new trial will be overruled and judgment entered on the verdict.

The rulings of the Supreme Court of Wisconsin will be found in the following cases:

The charter of the city of Janesville, authorizing a vote to be taken on the question of issuing bonds to aid in the construction of a railroad, was published in the private acts, and the certificate of publication attached to the volume was dated October 4, 1853, *held*: by the Supreme Court of Wisconsin, that the charter was first published by authority at the date of the certificate, and that it did not authorize the common council to pass an ordinance, and the people to vote on the question in July, nor the council to issue the bonds in August previous to the authoritative publication. Every person taking these bonds is chargeable with a knowledge of this want of authority. Cole, J. dissenting. Clark, *vs.* City of Janesville, 10 Wisconsin, 136.

The charter is a general law, within the provision of Art. VII, §21 of the Constitution of Wisconsin, which requires that "no general law shall be in force until published." The words, "general law," as here used, have the same meaning as *public act*, in the ordinary acceptation, and they are convertible terms. *Id.*

Bonds issued by the officers of a town pursuant to a vote of the people thereof, *before* the law authorizing such vote and issue of bonds was published, are void. Town of Rochester *vs.* The Alfred Bank, 13 Wisconsin, 432, affirmed in Berliner *vs.* Town of Waterloo, 14 Wisconsin, 378.

For a full citation of authorities on the subject of municipal bonds, see Schenck *vs.* Supervisors of Marshall county, decided by Drummond, J., June Term, 1866, to appear in subsequent volume of these Reports.

In Marcy *vs.* Town of Ohio, decided in the Northern District of Illinois, in March, 1873, Drummond, J., holds, that a *bona fide* holder of coupons payable to bearer, issued by a town by virtue of a special act of the Legislature, is not bound to prove that every prerequisite has been complied with; and that a mere irregularity in the form of an election does not constitute a good defense as against him. This case is published in the Chicago Legal News, April 19, 1873, and will duly appear in this series.

Consult also Mygatt *vs.* City of Green Bay, *ante p.* 292, and Goedgen *vs.* Supervisors of Manitowoc county, June Term, 1870, to be hereafter reported.

For an elaborate discussion of the bonds and contracts of municipal corporations, see Dillon on Corporations, §§370–426.—[*Reporter.*

[1] The City of Bridgeport *vs.* The Housatonic Railroad Company, 15 Connecticut, 475.

THE EOLIAN.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—JUNE, 1860.

IN ADMIRALTY.

1. The master of a vessel has no lien upon a vessel for services as pilot, he acting in both capacities.

2. The trusts committed to the master and pilot, should never be united in the same person, except temporarily, and under an emergency.

Appeal from District Court.

The facts appear in the opinion.

A. H. McGuffey and *Mills & Hoadley*, for libellant.

T. D. Lincoln, for respondent.

MCLEAN, J.—On the 7th of January, 1859, the above steamer was libelled by her captain and clerk at Cincinnati, and soon afterwards, on the application of the said master and clerk, the vessel was sold upon an interlocutory order. While in the hands of the marshal, the seamen and material-men, having admiralty liens upon the vessel, intervened and set up their claims.

On the sale of the boat it did not bring enough to discharge the admiralty liens established against her, even excluding the claim of the captain and clerk. The captain claimed two hundred dollars per month wages as pilot, professing to have received his wages as captain, and the sum of $496.24 was allowed him as pilot by the district court. The material-men, not being paid in full, appealed to this court from that part of the decree.

The question made is, whether the master is entitled to the allowance made to him as pilot, while he received the pay and discharged the duties of master.

As the master contracts with the owners of the ship and upon their personal credit, he has no lien on the ship or freight for his wages. The master is the agent of the owners and he has a right to pay himself for his expenses and charges out of the sale of the cargo; but he has no preferable lien as the seamen have, on the ship and cargo. It is said that this lien adheres to the last plank of the ship.

Mr. Justice Ware in *Drinkwater, et al., vs. The Freight and Cargo of the Brig Spartan*, Ware, 161, says "it is a well settled principle of law in this country, that the master has no remedy for his wages against the vessel." But he argues against the equity of this rule, and thinks that the master should be entitled to his lien. But the argument, as well as the rule, is against the master. He is the agent of the owners and receives the earnings of the ship and pays them over to whom of right they belong; and he has a lien on the freight, not only for his wages but for his own disbursements. He has various duties as connected with his services as master, which bind him to the fulfillment of his whole duties. These responsibilities should not be changed nor lightly regarded.[1]

In *Gardner vs. The Ship New Jersey*, 1 Peter's Admiralty, 228, the judge says, "I do not find any precedent or authority to warrant my granting the prayer of the master's petition in the case before me for his wages. His contract is clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship."

The pilots are often, if not generally, designated by the master of the vessel; and there would seem to be a great propriety in such a rule, as the commandant of the vessel should have confidence in those so intimately connected with the management of the ship.

Captain Logan had the command of the boat after Benedict left her, and from that time there seems to have been no regular pilot on board. From several witnesses it appears

[1] Ship Grand Turk, 1 Paine, 76; Fisher *vs.* Willing, 8 Sergeant & Rawle, 122; Brown *vs.* Lull, 2 Sumner, 452; Poland *vs.* Freight and Cargo of Brig Sparton, Ware, 134; Sheppard *vs.* Taylor, 5 Peters, 711.

that when the boat was about to land, Logan would take the command of her as pilot, and bring her to a proper mooring.

Aldrich acted as captain some eight or twelve days, but he was no pilot, and never saw the river before, to the knowledge of the witness. Logan says that he received for his services seventy five dollars per month, in addition to what he was to receive as pilot.

The pilot, by his employment, ordinarily is entitled to a lien on the boat, as the other hands employed. The laws regulating pilotage have generally been adopted from the respective laws of the states. The master has no lien on the ship for his wages, but he claims a lien on the ship for his compensation as pilot. These claims are incompatible. As pilot he may claim more than he is entitled to, and do wrong to the seamen. The master, being without a lien on the ship, can have no interest in making an unjust apportionment among the seamen, but this is not the case with the master, who serves also in the capacity of pilot, and who has a lien on the ship. On an occasion where, by the death of the pilot, a necessity may be thrown upon the master, temporarily obliging him to discharge the duty of pilot, it is admissible, but this can only occur under an exigency. The master and the pilot are the most efficient agents on the boat, and when he is employed in two capacities, there is also danger to the boat and her cargo.

The witnesses show, that while the pilot was necessarily at the helm, a certain person was performing the duties of master who was not fit for that duty. The master seems to have been the only person on the boat competent for its management, as master, or at the helm. This hazarded the safety of the boat and the lives of its passengers. If the boat was not lost it may have been more fortunate for the crew than they had any right to expect.

With all the care and prudence which can be exercised, a boat improperly officered always incurs danger. A vigilant policy should be required, especially by the master and pilot.

There was a strong motive in the master to unite the two capacities of master and pilot, by which means his pay was

greatly increased. This is an irregularity and an abuse that should be corrected. Such a course may be adopted with the view of enabling the master, and other officers of the boat at a distant port, to seize the boat and have her sold, fraudulently.

The trusts committed to the master and pilot should never be united in the same person, as the interests represented are often conflicting, and can only be united temporarily and under an emergency.

The distinctions which exist among the officers of the boat, tend to secure the rights of the owners and others, and prevent fraudulent combinations. The double capacity in which the master acted was wrong in principle and prejudicial to all the interests concerned.

The exception to the allowance of the master as pilot, while he received the pay as master, is the only one insisted on, and the court thinks it ought to be sustained. The court will, therefore, reverse the decision of the district court on this ground, and direct the fund distributed to the pilot to be distributed to the claimants, who have a prior lien. In all other respects the decree of the district court is affirmed.

In Willard et rex. Adm. *vs.* Dorr, 3 Mason, 167, Story J., ruled that the master could have no claim in admiralty for services performed by him, in any character other than that of master.—[*Reporter.*

LEE vs. CHILLICOTHE BRANCH OF STATE BANK OF OHIO.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—JULY TERM, 1860.

1. RESTRICTIVE BILLS OF EXCHANGE—An indorsement on a bill of exchange, "credit my account," is restrictive, and puts an end to its negotiability. It is an appropriation of the proceeds which renders any other appropriation illegal. The credit should be given when the bill became payable—this is the ordinary course of dealing, and the court will not presume a different course.

2. Whether an indorsement is restrictive depends upon the intention of the parties, as expressed.

3. Such an indorsement implies an open account, which is to be credited, and this can only be done by payment. Entering the bill, either before or after maturity, as a credit on the account, would not be within the order—the words are mandatory.

4. INDORSEMENT.—"PAY TO ACCOUNT OF," ETC., IS RESTRICTIVE, AND NOT A TRANSFER.—An indorsement to pay for the use, or account of the indorser, is not an assignment of the security, but only an authority to receive the money, and imports that the indorsee receives the bill for a special purpose, and as trustee for the indorser; it is equivalent to a direct notice to every party to whom it may be afterwards presented, that he has not a right to dispose of it as his own property.

5. HOLDER OF RESTRICTED BILL IS TRUSTEE.—A holder who takes a bill, the circulation of which is restricted by indorsement, cannot in good faith sue the drawer or acceptor, but holds the bill or its proceeds as trustee for the restraining party.

6. PAYEE HAS POWER TO LIMIT.—The payee, having the absolute property in the bill, and the right of disposition thereof, has the power of limiting the payment to whom he pleases.

7. If a bill be restrictively indorsed, a subsequent indorser takes it upon the same trust that was devolved upon the first indorsee.

8. BUT RESTRICTIVE INDORSEMENT GIVES AN EQUITY.—But the indorsement, though not conveying the property in the bill, gives an undoubted equity to the money to be paid; and this it is the safer and better course to enforce.

9. PARTY WHOSE NAME NOT ON BILL CANNOT BE SUED.—A party whose name does not appear upon a bill of exchange cannot be sued upon it. His name may be signed by an agent, but it must appear that the agent undertook to bind his principal.

This was an action brought by the plaintiffs, as indorsees of the defendants, on fourteen bills of exchange.

The special counts aver that the bills were drawn by certain named persons at Chillicothe, Ohio, on one Edwin Ludlow, of New York, by the name of E. Ludlow, Esq., cashier, Ohio Life Insurance and Trust Company, payable to the order of the defendant, "by the name and style of James B. Scott, its cashier,"—acceptance waived; that the defendant, by its cashier, then and there, for the purpose duly authorized, indorsed and delivered the bills to said Edwin Ludlow, cashier, who indorsed them to the plaintiffs; that they were duly presented and protested for non-payment, and notice given to the defendant.

The defendant was a corporation created under the law of Ohio; and the Ohio Life and Trust Company was also a corporation chartered under the laws of Ohio, each being vested with banking powers. The principal office of the Trust Company has always been in Cincinnati; but for many years its principal cashier kept an office in the city of New York, called its New York agency.

Hunter & Dougherty and *Henry Stanberry*, for plaintiffs, cited the following cases of restrictive indorsements:

Edie vs. The East India Company, 2 Burrow, 1216; *Ancher et al. vs. Bank of England*, 2 Douglas, 637; *Treuttel vs. Barandon et al.*, 8 Taunton, 100; *Lloyd vs. Sigourney*, 5 Bingham, 525; *Attenborough vs. Mackenzie*, 36 English Law and Equity, 562; *Theobald vs. Hare*, 8 Ben Monroe, 39.

Messrs. Vinton, Thurman, Taft & Perry, counsel for defendant filed an elaborate brief, citing the following cases on restrictive indorsements:

Snee vs. Prescot, 1 Atkyns, 249; *Edie vs. The East India Company*, 2 Burrow, 1227; *Ancher vs. Bank of England*, 2 Douglas, 637; *Treuttel et al. vs. Barandon et al.*, 8 Taunton, 100; *In re Munn*, 15 English Common Law, 319; *Lloyd et al. vs. Sigourney*, 5 Bingham, 525; *Gully vs. Bishop of Exeter*, 15 English Common Law, 527; *Rice vs. Stearns et al.*, 3 Mas-

sachusetts, 227; *Wilson vs. Holmes*, 5 Massachusetts, 544; *Drew vs. Jacocks*, 2 Murphy, 138.

No action can be maintained against the defendant upon these bills because his name does not appear upon them.

Pentz vs. Stanton, 10 Wendell, 271; *Stackpole vs. Arnold*, 11 Massachusetts, 28; *Leadbitter vs. Farrow*, 5 Maule and Selwyn, 348; *Wilson vs. Rastall*, 3 Term Reports, 757.

The defendant's cashier had no power to transfer the bill. No such power was expressly given him, and he could not derive it from custom.

Hallowell & Augusta Bank vs. Hamlin, 14 Massachusetts, 180; *Hartford Bank vs. Barry*, 17 Massachusetts, 97; *Wyman vs. Hallowell & Augusta Bank*, 14 Massachusetts, 58; *Salem Bank vs. Gloucester Bank*, 17 Massachusetts, 29.

The transfers by Ludlow to the plaintiffs being fraudulent, the *onus* lies on the plaintiffs to prove *bona fides* and the payment of a valuable consideration, or parting with value.

McKesson vs. Stanberry, 3 Ohio State, 156; *United States vs. Price*, 2 Washington, 460; *Patterson vs. Hardacre*, 4 Taunton, 116; *Smith vs. Braine*, 3 English Law and Equity, 379; *Woodhull vs. Holmes*, 10 Johnson, 231; *Skelding vs. Warren*, 15 Johnson, 270; *Brown vs. Taber*, 5 Wendell, 566; *Vallett vs. Parker*, 6 Wendell, 615; *Wardell vs. Howell*, 9 Wendell, 170; *Micklethwaite vs. Thebaud*, 4 Sandford, 97.

The bills were merely pledged by Ludlow to the plaintiffs, as collateral security for a precedent indebtedness, or upon account. This leaves the equities open.

Field vs. Holland, 1 American Leading Cases, (5th ed.) 334; *Roxborough vs. Messick*, 6 Ohio State, 448; *Bay vs. Coddington et al.*, 5 Johnson's Chancery, 54; *Coddington vs. Bay*, 20 Johnson, 637; *Rosa vs. Brotherson*, 10 Wendell, 86; *Smith vs. Van Loan*, 16 Wendell, 659; *Jones vs. Swan*, 6 Wendell, 589.

Hart vs. Palmer, 12 Wendell, 523; *Manhattan Co. vs. Reynolds*, 2 Hill, 140; *Stalker vs. McDonald*, 6 Hill, 93; *Furniss vs. Gilchrist*, 1 Sandford, 53; *Bank of St Albans vs. Gilliland*, 23 Wendell, 311; *Small vs. Smith*, 1 Denio, 583;

Wardell vs. Howell, 9 Wendell, 170; *Stewart vs. Small* 2 Barbour, 559; *Spear vs. Myers*, 6 Barbour, 445; *Bramhall vs. Beckett*, 31 Maine, 205; *Jenness vs. Bean*, 10 New Hampshire, 266; *Williams vs. Little*, 11 New Hampshire, 66; *Prentice vs. Zane*, 2 Grattan, 262; *Petrie vs. Clark*, 11 Sergeant & Rawle, 377; *Kirkpatrick vs. Muirhead*, 16 Pennsylvania State, 117; *Kimbro vs. Lytle*, 10 Yerger, 417, 428; *Brooks vs. Whitson*, 7 Smedes & Marshall, 513; *Reddick vs. Jones*, 6 Iredell, 109.

Express proof of actual knowledge by the purchaser is not required. His knowledge may be proved by circumstances and constructive notice may suffice.

Wiggin et al. vs. Bush, 12 Johnson, 306; *Brown vs. Taber*, 5 Wendell 566; *Comstock vs. Hoag*, Id., 600; *Payne vs. Cutler*, 13 Wendell, 605; *Small vs. Smith*, 1 Denio, 583; *Solomons vs. Bank of England*, 13 East, 135; *Goodman vs. Harvey et al.*, 4 Adolphus & Ellis, 870; *Clarke vs. Spence*, 31 English Common Law, 212.

If a note or bill be peculiar in its form, or have indorsed upon it, or written on its face, any marks or matter the purchaser is put upon inquiry.

Fowler vs. Brantley, 14 Peters, 318; *Jones vs. Fales*, 4 Massachusetts, 245, 252-3; *Springfield Bank vs. Merrick*, 14 Massachusetts, 322; *Heywood vs. Perrin*, 10 Pickering, 228; *Barnard vs. Cushing*, 4 Metcalf, 230; *Shaw vs. M. E. Society in Lowell*, 8 Metcalf, 226; *Fletcher vs. Blodgett*, 16 Vermont, 26; *Sanders vs. Bacon*, 8 Johnson 485.

McLean, J.—No particular form of words is essential to an indorsement, if the words used import a transfer of the title to the bill and designate the transferee.[1]

Indorsements are either in full or in blank; a full indorsement is that by which the indorser orders the money to be paid to some particular person by name; a blank indorsement consists only of the name of the indorser,[2] as where the indorser simply writes his name on the back of negotiable paper.

[1] Story on Bills, §204.

[2] 1 Jacob's Law Dictionary, 324.

There are also restrictive indorsements, which stop the currency of the bill, and it often becomes an important question whether the indorsement is in full, in blank, or restrictive. On this depends the decision of the important case now before us.

Where the indorsement is in full or in blank, without restriction, the holder may fill up the blanks and perfect his title at pleasure.

In the leading case of *Edie vs. The East India Co.*,[1] a new trial was granted, because at the trial the usage of merchants was proved, which the court held to be erroneous, and on this ground a new trial was granted.

On argument the declaration was held to be good on demurrer, although the assignment on the note was alleged to have been made to Witherhead, without saying to "him and order."

Every one knows the splendid reputation of Lord Mansfield for his liberal views on commercial law, which were greatly in advance of Kenyon and others, but were still, in some things, behind the present day. By some of the judges in the above case, a restrictive indorsement had never been heard of, and doubts were expressed whether the negotiability of an instrument could be restricted.

The case of *Ancher et al. vs. Bank of England*, 2 Douglas, 637, was upon a bill of exchange payable to A or order. A indorsed it as follows: "The within must be credited to Capt. Morton Lassal Dahl, value in account." This was held by Lord Mansfield to be a restrictive indorsement, though Butler was of a contrary opinion. A majority of the court held that the indorsement was simply a request to pass the amount to Dahl's credit. Lord Mansfield said the indorser did not mean to make himself answerable, as indorser, or to enable Dahl to raise money on the bill.

So in *Treutell vs. Barandon*, 8 Taunton, 100, it was held that the indorsement, "pay to J. P. Rouse or order, on account for Mr. Treutell & Wurtz," was restrictive.

[1] 2 Burrow, 1216.

And in *Lloyd vs. Sigourney*, 5 Bingham, 525, the indorsement was in these words: "Pay to Samuel Williams, Esq., of London, or his order for my use," and the court says, "Whoever reads the indorsement must perceive that its operation is limited."

It is said the indorsements in this case are capable of various constructions, and have no definite meaning.

The direction to credit the account of the indorser is addressed to Ludlow, it is said, and not to the drawers; Ludlow is the drawee, but on the face of the bills his acceptance is waived, and the bills were not sent to him for acceptance, but for some other purpose, either to discount them, as urged by the plaintiffs, and then credit the indorser with the proceeds, or to credit the bills in account to the indorser, or to hold them until payment by the drawers, and then credit the amount to the indorser. And it is contended, that "on the face of the instrument, it is impossible to say what was meant."

The bills were drawn by certain persons at Chillicothe, Ohio, on Edwin Ludlow, of New York, as cashier of the Ohio Life Insurance and Trust Company, payable to the order of the defendant, indorsed, "credit my account, James B. Scott, cashier." The bill had some time to run, but the credit was to be given when the bill became payable. This was the ordinary course of dealing, and the court will not presume a different course without proof. The thing to be done under the indorsement, was subject to no contingency. The direction to credit the account of Scott, cashier, was indorsed upon the bill, and this put an end to its negotiability. It was an appropriation of the proceeds of the note, and which rendered any other appropriation of them illegal.

Whether an indorsement be restrictive or not, depends upon the intention of the parties, as expressed. "Pay to J. S. only;" "pay to A for my account;" "pay the contents to my use;" "pay the contents to the use of a third person;" "carry this bill to the credit of A, a third person;" "pay to A B, or order, for my use;" "pay to A B for my account;" "pay the within to A B, for the use of C D;" "pay the money to my use;" "pay the money

to my servant for my use;"—these are specimens from cases where the indorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction, the negotiability of the bill ceases.

Had Ludlow filled up an indorsement over Scott's signature, under the restriction, it could only have been done thus,—"pay E. Ludlow, cashier, to credit my account, Jas. B. Scott;" or "pay E. Ludlow, cashier, and credit my account, Jas. B. Scott, cashier," or "pay E. Ludlow, cashier, credit my account, Jas. B. Scott, cashier."

"'Pay J. H. for my use, or for my account,' shows the intent of the indorser, and is barely an authority to receive the money upon it. It imports that the indorsee receives the bill for a special purpose, and as a trustee for the party indorsing; and is equivalent to a direct notice to every person to whom it may be afterwards presented, that he has not a right to dispose of it as his own property."[1]

Courts will take notice of a usage, in transmitting bills from one part of the country to another, for collection especially, where the forms of indorsements are influenced by the usage.[2] But this principle is clearly settled without the aid of usage, by judicial decision.

The words, "credit my account," seem to be too explicit to be mistaken, especially in a commercial transaction. This implies an open account, which is to be credited, and this could only be done by payment. Entering the bill before or after it becomes due, as a credit on the account, would not be within the order, as in a proper sense, no credit could be entered without payment. The words "credit my account, when due," were mandatory, and could only apply to the account specified. This is too clear for controversy.

To apply the proceeds of the bill to a credit on any other account than the one specified, would be a fraud on the de-

[1] Edwards on Bills and Promissory Notes, 277.

[2] Bank of Washington *vs.* Triplett & Neale, 1 Peters, 25, 30; Bowling *vs.* Harrison, 6 Howard, 258; Wallace *vs.* McConnell, 13 Peters, 150.

fendant, under the notice, and a court of equity would restrain such payment or give a judgment at law for its recovery.

Shortly before the failure of the Trust Company, Ludlow, as plaintiffs allege, indorsed the bills in question to the plaintiffs, as collateral security for loans which they made to the Trust Company. A holder who takes a bill, the circulation of which was restricted by an indorsement, cannot, in good faith sue the drawer or acceptor upon it, but holds the bill or the money raised by him as the trustee of the restraining party.

"The payee or indorsee having the absolute property in the bill, and the right of disposing thereof, has the power of limiting the payment to whom he pleases; and consequently, he may make a restrictive indorsement: thus he may stop the currency of the bill, by giving a bare authority to receive the money, as by an indorsement requesting the drawee to "pay to A for my use," or to "J S only," or, "the within must be credited to A B," which modes prevent a blank indorsement from being filled up by the indorsee, so as to convey any interest in the bill to himself, and from making a transfer of the bill, &c.; and when made for the use of the indorser, is renewable in its nature by him like a power of attorney."[1]

An indorsement, to pay the contents to my use, or to the use of a third person, or to carry this bill to the credit of a third person, is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement.[2]

The declaration is that the defendant indorsed the bills to Ludlow, and if he had filled up the instrument it would have read, "Pay to E. Ludlow, to credit my account, James B. Scott, cashier." Thus showing that the money was to be paid to Ludlow, not for himself, but for the use of James B. Scott, cashier. Or suppose the plaintiffs were to strike out Ludlow's indorsement and fill up Scott's indorsement to themselves, which they may do if Scott's is a blank indorsement. It would then read, "Pay Lee & Co., to credit my account, James B.

[1] Chitty on Bills, 233.

[2] Chitty on Bills 232, note 1.

Scott, Cash'r;" and this would show that the money, if paid, would belong to the defendant, and consequently that Lee & Co. have no right to the money.

An indorsement "payable to J. S. only," or by indorsing it "the within must be credited to J. S.,"[1] or by any other words clearly demonstrating his intention to make a restrictive and limited indorsement, would be sufficient.[2]

Judge Story says "It is difficult to assert what language will amount to a restrictive indorsement, or in other words, what language is sufficient to show a clear intention to restrain the general negotiability of the instrument, or the general purposes to which the indorsement might otherwise entitle the indorsee to apply it. Where the indorsement is, 'pay to A B only,' the word 'only' makes it clearly restrictive, and does not authorize a payment or indorsement to any other party. So if a bill should be indorsed, 'the within to be credited to A B', or, 'pay the within to A B for the use of C D,' it would be deemed a restrictive indorsement, so far as to restrain the negotiability, except for the very purposes indicated in the indorsement. In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof."[3]

This leaves the question open as to what cases the lien attaches and where it does not. On this head the authorities to some extent are in conflict. Lord Hardwick says in *Snee vs. Prescot*, 1 Atkyns, 249, "promissory notes and bills of exchange are frequently indorsed, 'pay the money to my use,' in order to prevent their being filled up with such an indorsement as passes the interest." If no valuable consideration appears to have been paid for the bill, none will be presumed.

In *Ancher vs. Bank of England*, an indorsement that the within must be credited to Captain Morton Larsen Dahl, value on account, was a restrictive indorsement, and stopped the

[1] Ancher *vs.* Bank of England, 2 Douglas, 637.

[2] Chitty on Bills, 232-3, and notes.

[3] Story on Bills, §211.

negotiability of the bill. And Lord Mansfield said, "It does not seem to me that, after the special indorsement by Morterlin, Dahl himself could have indorsed it over."

And Willes, J. "I am of the same opinion. The question is whether the negotiability is not restrained by the indorsement; and I think it is."

Ashurst, J. "I am of the same opinion. I think Dahl himself could not have indorsed it."

In *Drew vs. Jacocks*, 2 Murphy (N. C.) 138, it was said, "Indorsements are of two kinds, general and restrictive, the latter precluding the person to whom it is made from transferring the instrument over to another, so as to give him a right of action, either against the person imposing the restriction or against any of the preceding parties."

But if the bill be restrictively indorsed, the subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. Hence he can maintain no action against the restraining indorser. He is a mere agent and trustee for his principal, and whoever takes the money holds it under a similar trust.[1]

This indorsement was held to be restrictive. "A bill of exchange drawn in America, on a house in London, payable to order, was indorsed by the payee generally to A, and by him in these words: 'Pay to B, or his order, for my use.' B applied to his banker to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B. Held that the indorsement was restrictive; that the property in the bill remained in A, and that he was entitled to recover the amount of the bill from the bankers."

Chief Justice Parsons, says: "It is also settled that when a negotiable security is indorsed, pay the contents to my use, or to the use of a third person, or carry this to the credit of a third person, such an indorsement is not an assignment of the security, but merely an authority to pay the money agreeably to the direction in the indorsement."[2]

[1] Lloyd *vs.* Sigourney, *et al.*, 5 Bingham, 15 English Common Law, 525.

[2] Rice *vs.* Stearns, *et al.*, 3 Massachusetts, 225.

Chief Justice Parsons said: "The merits of this question depend on the interest which Wilson, the plaintiff, had in the bill. His right to put the bill in suit in his own name must depend upon the effect of the indorsement. It is expressly made to him for the use of the payees. Upon this indorsement, had there been no acknowledgment of value received in account, Wilson would have no property in the bill general or special, and he could not recover upon it in his own name. But admitting, by the acknowledgment of that value received in account, it is the usage of merchants to consider the bill as transferred to the indorsee, as the factor of the indorser, who may sue it, either in his own name or in the name of the indorser, of which we give no opinion; yet the same facts may be given in evidence against the factor as against the principal."[1]

On a pretty extensive view of the authorities, it is found that under some of the restrictive indorsements, no suit can be maintained against the indorser by the assignee. But the restrictive nature of the indorsements, which do not transfer the property in the bill, but operate as an appointment to pay the money, especially where the bill has been assigned since the transfer, makes it the safer and better course to enforce the equity against the holder of the bill. The indorsement on the bill, although it may not convey the property in the bill, gives an undoubted equity to the money directed to be paid. And this may be recovered against any one who has possession of the bill.

No action can be maintained on these bills, as the name of the defendant does not appear upon them. They are drawn by certain individuals, payable to James B. Scott, cashier, and indorsed by him without any designation as to his agency. He, therefore, cannot sustain a suit on the bill, as he has not a legal title to it. He may become a guarantor on the bill.

In *Pentz vs. Stanton*, 10 Wendell, 271, it is held that the plaintiff cannot recover upon the bill of exchange against the present defendant; his name nowhere appears upon it, and Chitty says it is a general rule that no person can be con-

[1] Wilson *vs.* Holmes, 5 Massachusetts, 545.

sidered a party to a bill unless his name or the name of the firm of which he is a partner, appears on some part of it.

In *Fenn vs. Harrison*, 3 Term R. 762, Buller J., observes that in the case of bills of exchange we know precisely what remedy the holder has if the bill be not paid; his security appears on the face of the bill itself; the acceptor, the drawer and the indorsers are all liable in their turn, but they are only liable because they have written their names on the bill. A person may draw a bill of exchange by his agent, and it will be obligatory. But the agent must sign the name of the principal, or it must appear on the face of the bill itself. The form is not important if the name of the principal appears on the bill.[1] Where a party is sued on an express contract, it must at least appear on the face of the instrument that the agent undertook to bind the principal. The appellation by which the contractor may be distinguished is of no importance, provided it be sanctioned by the principal and embraced in the power conferred on the agent.

Judgment for defendant.

[1] Story on Agency, §§147, 154, 155.

FITCH vs. REMER.

CIRCUIT COURT.—DISTRICT OF MICHIGAN.—JULY TERM, 1860.

LEX LOCI.

1. A mortgage on real estate in Michigan, executed to secure a note payable in New York with ten per cent. interest is valid under the laws of Michigan.

2. The contract is not a New York contract, and is not rendered usurious and void by the statute of that state, prohibiting the taking of more than seven per cent. interest.

3. The securities bearing ten per cent. interest, a legal rate in Michigan, the court cannot presume, against the fact, that usury under the New York Statute was intended.

The facts appear in the opinion.

Mr Duffield, for complainant.

Mr. Lathrop, for defendants.

MCLEAN, J.—This bill was filed to foreclose a mortgage. When the mortgage was executed, Fitch resided in New York, the defendants in the state of Michigan. On the first of January, 1850, the complainant loaned to the defendants two thousand dollars, to secure which the defendants executed a bond and mortgage on land in Michigan. The sum loaned was to be paid in January, 1856, to the complainant, at his residence in the State of New York, with interest at ten per cent. per annum, payable semi-annually.

In New York the legal interest is seven per cent. per annum, and any per cent. above that sum is usurious, and the instrument is declared to be void. In Michigan there is no penalty for usury, the excess over the legal rate, only, being recoverable.

It is agreed that this proceeding to enforce these securities

must be under the laws of New York or the laws of Michigan, whichever shall be held to be the law of the contract. This is the only question in the case, there being no dispute about the facts.

The general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed.[1] In *Reimsdyk vs. Kane et al.*, 1 Gallison, 374, Judge Story says the rule is well settled, "that the law of the place where a contract is made is to govern as to the nature, validity and construction of such contract," unless it shall appear from the tenor of such contract, it was entered into with a view to the laws of some other state; as where a negotiable note was indorsed in a state different from that in which it was made. *Slacum vs. Pomery*, 6 Cranch, 221, Lord Mansfield, in *Robinson vs. Bland*, 2 Burrow, 1077, says, "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country." And Kent Ch., J., in 1 Johnson, 92, said, "The force and effect of the contract must be determined from the contract itself, and not by proof *aliunde*."

Huberus, in his De Conflictu Legum, vol. 2, book 1, tit. 3, says, "The general rule is, that contracts are to be interpreted according to the laws of the country where they are made; but if, from the terms or nature of the contract, it appears it was to be executed in a foreign country, or that the parties had respect to the laws of another country, then the place of making the contract becomes immaterial, and the obligation must be tested by the laws of the country where the duty was to be performed." In *Champant vs. Ranelagh*, Precedents in Chancery, 128, it was decided that a bond executed in England, and made payable in Ireland, carries Irish interest, where no interest was mentioned.[2] In *Robinson vs. Bland*, 2 Burrow, 1077, a bill of exchange drawn in France for money lent there, and made payable in England, was deemed a contract subject to the laws of England, and to bear English interest. In *Thomp-*

[1] 2 Kent's Commentaries, 459; Story's Conflict of Laws, §242.

[2] Fanning *vs.* Consequa, 19 Johnson, 511.

son vs. Ketcham, 4 Johnson, 285, a note was drawn in Jamaica, made payable in New York, and the Supreme Court of New York followed the same rule. In *Smith vs. Smith*, 2 Johnson, 235; *Ruggles vs. Keeler*, 3 Johnson, 263 and *Van Schaick vs. Edwards*, 2 Johnson's Cases, 355, the same doctrine was carried out.

A contract is to be construed by the law under which it was made, but if entered into to be performed in another state or place, it is to be treated, generally, as to its force and effect, by the laws of the latter place; and it will be good or bad according to the laws of such place. To this there is an exception in regard to official bonds, taken in pursuance of an act of Congress, which are not subject to the local law, but are assumed to have been executed at the seat of the federal government.[1]

Under the principles laid down in the above authorities, it is insisted that the instrument before us is a New York contract, and that the agreement to pay more than seven per cent. interest is usurious and void; and as the contract binds the defendant to pay the complainant, in New York, interest at the rate of ten per cent. per annum, semi-annually, and the loan at the end of six years, the argument is presented with great force against the legal rights of the complainant; and this contract, it is urged, is to be governed by the law of the place of performance, and whatever shall be a good defense there shall be good everywhere. This doctrine is laid down in Story on Conflict of Laws, §§331, 305, and Story on Bills of Exchange, §161. And it is admitted, that where a contract is made in one place, payable in another, without fixing the rate of interest, such rate is determined generally by the laws of the latter place.[2]

[1] Cox *vs.* United States, 6 Peters, 173; Andrews *vs.* Pond, 13 Peters, 77; Bell *vs.* Bruen, 1 Howard, 169; Brabston *vs.* Gibson, 9 Howard, 263; Fanning *vs.* Consequa, 17 Johnson, 511; Ruggles *vs.* Keeler, 3 Johnson, 263; Thompson *vs.* Ketcham, 4 Johnson, 285; Barney *vs.* Newcomb, 9 Cushing, 46; Story on Conflict of Laws, § 280; Story on Bills, §147; Robinson *vs.* Bland, 2 Burrow, 1077.

[2] Scofield & Taylor *vs.* Day & Galston, 20 Johnson, 102; De Wolf *vs.* Johnson, 10 Wheaton, 10; Healy *vs.* Gorman, 3 Green. 328.

And it is admitted by the highest authority, that any interest may be lawfully stipulated for, not exceeding the law of the place where the instrument is payable.[1]

These concentrated authorities seem to cover the whole ground of controversy, leaving but little for doubt or speculation. Principles are sometimes evolved from the exigencies of society, and grow into favor from their adaptation to the fitness of things. No one can say that both the common and civil law have not been ameliorated and improved by such means. But we are to look to established principles and not to theories in considering the case before us.

The debt is founded upon a bond and mortgage for the payment of two thousand dollars, executed on land in Michigan, by the defendant to the complainant, a citizen of New York, payable in six years at the rate of ten per cent. per annum semi-annually, on the first days of July and January, to the complainant, at his residence in New York.

In 2 Kent's Commentaries, 460, it is said: "If, however, the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though that rate be higher than is lawful by the law of the place where payment was to be made, the specified rate of interest at the place of the contract has been allowed by the courts of justice in that place; for that is part of the substance of the contract. The general doctrine is, that the law of the place where the contract is made is to determine the rate of interest when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern."[2]

"With respect to the question of usury, in order to hold the

[1] Andrews *vs.* Pond, 13 Peters, 77; Thompson *vs.* Ketcham, 4 Johnson, 285; Robb *vs.* Halsey, 11 Smedes & Marshall, 140.

[2] De Wolf *vs.* Johnson, 10 Wheaton, 367; Quince *vs.* Callander, 1 Desaussure, 160.

contract to be usurious it must appear that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for if it was to be made abroad, it would not be usurious."[1]

In reference to the above cited case, Chancellor Kent says, Vol. 2, of his Commentaries, 461: "According to the case of *Thompson vs. Powles*, it is now the received doctrine at Westminster Hall, that the rate of interest on loans is to be governed by the law of the place where the money was to be used or paid, or to which the loan has reference; and that a contract made in London to pay in America, at a rate of interest exceeding the lawful interest in England, was not a usurious contract, for the stipulated interest was parcel of the contract." This appears to be a liberal relaxation of the rigor of the former rule in the English courts, and it is comformable to the American cases.[2]

In the somewhat noted case of *Depau vs. Humphreys*, 20 Martin, 1, the note was given in New Orleans, payable in New York, for a large sum of money, bearing an interest of ten per cent., being the legal interest in Louisiana, the New York legal interest being seven per cent. only. The question was, whether the note was tainted with usury, as it would be, if made in New York. The Supreme Court of Louisiana decided that it was not usurious; and that although the note was made payable at New York, yet the interest might be stipulated for, either according to the law of Louisiana or according to that of New York. To the same import are the cases of *Peck vs. Mayo*, 14 Vermont, 33; and *Chapman vs. Robertson*, 6 Paige, 627. In *Pratt vs. Adams*, 7 Paige, 615, the court says, "if the contract was not illegal by the laws of the country where it was made, and where the money was loaned, the fact that the drafts were payable in New York would not render them void under our usury laws, except in a case where the loan of the money out of this state was a mere device to evade the

[1] Thompson *vs.* Powles, 2 Simon, 211.

[2] Story's Conflict of Laws, §305.

operation of the law of this state which was intended as a cover for usury." The doctrine is well established, if a mortgage be executed in Michigan, which is the domicil of the mortgagor, at the legal rate of interest, full effect will be given to the security without reference to the usury laws of any other state, which neither party intended to violate. In *Andrews vs. Pond*, 13 Peters, 78, the court says, "the general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

By the statute of Michigan, ten per cent. was the legal rate of interest, and this was the amount stipulated to be paid, and constituted a part of the contract; the court cannot presume, therefore, against the fact, that usury under the New York statute was intended.

In *Ohio Insurance Company vs. Edmondson*, 5 Louisiana, 295, 299, 300, the court says, "by the comity of nations a practice has been adopted, by which courts of justice examine into, and enforce contracts made in other states, and carry them into effect according to the laws of the place where the transaction took its rise. This practice has become so general in modern times, that it may be almost stated to be now a rule of international law, and it is subject only to the exception, that the contract to which aid is required, should not, either in itself or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced."[1]

In *Chapman vs. Robertson*, 6 Paige, 633, the court said, "I have arrived at the conclusion, that this mortgage, executed here, and upon property in this state (New York), being valid by the *lex situs*, which is also the law of the domicil of the mortgagor, it is the duty of this court to give full effect to the security."

[1] Story's Conflicts of Laws, §244.

If no place of payment is prescribed, the contract takes effect as a contract of the place where it is made; and being payable generally, it is payable everywhere, and after a demand and refusal of payment, interest will be allowed according to the law of the place of the contract. But if the place of payment or of performance is different from that of the contract, then the interest may be validly contracted for at any rate not exceeding that which is allowed in the place of payment or performance.

"Whether a contract is usurious or not, depends, not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract is made, and is to be executed. A contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would nevertheless, be valid in England; and so a contract to allow interest upon credits given in Gibraltar at such higher rate would be valid in favor of the English creditor." [1]

In his Conflict of Laws, §488, Mr. Justice Story says, "Boullenois has no where to my knowledge, directly and positively treated the question, whether the interest may be stipulated for according to the place of the contract, when payment is to be made in another place where it would be illegal." In §304, *a*, he says, "if the transaction is *bona fide* and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher rate of interest." No one ever doubted this. The daily experience of every business man shows that a note is legal, if given for a rate of interest fixed by law in any state where it is payable. In Michigan, ten per cent. is the legal rate of interest, and may be recovered.

Mr. Justice Story objects to the principle here laid down, and there is no jurist in America or in England, of higher authority. He admits in section 299, that the phrase *lex loci contractus* may have a double meaning or aspect; and that it may indifferently indicate where the contract is actually made,

[1] Story on Conflict of Laws, §292.

or where it is virtually made, according to the intent of the parties, that is, the place of payment or performance. And he says, "we have seen that the rule of the civil law clearly indicates this."

No one can suppose that a contract can be distributed into parts, and so made good for the whole, but that the clear intention of the parties may be understood and applied; as where the legal rate of interest stipulated to be paid is higher where the contract is entered into than at the place of payment, the higher rate may be presumed to be within the intention of the parties.

If the transaction is *bona fide* and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest. But then the transaction must be *bona fide*, and not intended as a mere cover for usury.[1] Mr. Chancellor Kent has correctly laid down the modern doctrine; and he is fully borne out by the authorities. "The law of the place," says he, "where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on land in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern."[2]

It is agreed that the above loan was made in this manner: "An agent of the complainant, Mr Loomis, residing in St. Clair county, drew a draft on the complainant, caused the same to be cashed at a bank in the city of Detroit, and paid the proceeds over to said Remer, at said St. Clair; the bond and mortgage were executed at St. Clair, on real estate in said county of St Clair, and delivered to said Loomis at that place, as the agent of complainant."

[1] Andrews *vs.* Pond, 13 Peters, 65.

[2] 2 Kent, 460; DeWolf *vs.* Johnson, 10 Wheaton, 367; Schofield *vs.* Day, 20 Johnson, 102; Thompson *vs.* Powles, 2 Simon, 194.

It is also agreed, that by the laws of the State of New York, in force at the time of making said loan, and ever since in force, the taking more than seven per centum per annum upon any loan of money was prohibited, and any contract or security made or taken in violation thereof, was by such laws void.

Now, that this was a perfectly fair transaction, understood by the parties, no one can question. The contract was valid under the laws of Michigan, unaffected by any taint of usury. No deception was practiced. The contract can be legally enforced in Michigan; and this suit is now brought to enforce it. There is not a circumstance to show that the parties had in view any other rate of interest than that which was stipulated in the contract. And if that rate of interest cannot be recovered under the laws of New York, no one doubts that it may be recovered in the state of Michigan, where the contract was made. In *Andrews vs. Pond*, 13 Peters, 78, the Supreme Court says: "If the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." And the court says, taking eight per cent. in Alabama is no violation of the New York law.

The bond and mortgage are valid under the Michigan law, and the complainant elects, as he has a right to do, that he will proceed under the Michigan statute. And it is difficult to perceive on what ground the defendant can complain that his rights are affected by the usury law of New York. The ten per cent. interest which the defendant agreed to pay, was a part of the contract authorized by the laws of Michigan, and this contract is not supposed to be impaired by an agreement to pay the same rate of interest in New York. The mortgagee claims the ten per cent. interest, under the Michigan law, and this he is entitled to.

DAVIDSON vs. SMITH.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—AUGUST, 1860.

STATE INSOLVENT LAWS.—EFFECT IN ANOTHER STATE.

1. A non-resident plaintiff who has brought suit in the courts of the state where the defendant resides has subjected himself to the jurisdiction of that state, and is bound by discharge afterwards granted under the insolvent laws of that state.

2. By obtaining a judgment in the Circuit Court of the United States for another state, upon a record of the judgment of the state court, the plaintiff has not changed his position. A satisfaction of the judgment in the state court would operate as a satisfaction of that in the United States Court; and whatever would bar the former would also bar the latter.

3. Although a state insolvent law has no force or validity outside of the state, except such as may be given it by comity, the principle of the Constitution of the United States, that full faith and credit shall be given in each state, to the judicial proceedings of every other state, requires that judgments when sued on in another state shall be considered of the same force and effect as in the state wherein they were originally rendered.

This action was founded on a record of a judgment rendered in the Circuit Court of the United States, for the Northern District of Illinois, July term, 1855, against the defendant, as a citizen of the State of Wisconsin, and in favor of the plaintiffs as citizens of Illinois. That suit was upon a record of a judgment in favor of the plaintiffs against the defendant rendered in September, 1854, in the Supreme Court of the State of New York, for the county of Chautauqua.

The defendant pleads in bar, that the judgment of the court of the State of New York, was founded on his promissory note, made to one Oliver Patch, or order, in the State of New York, and payable in the city of New York, and by Patch indorsed to the plaintiffs; that at the time of making the note

and of the rendition of the first judgment, he, the defendant, and Patch were inhabitants and residents of the State of New York; that in the month of March, 1857, the defendant presented his petition to the county court of the county of Wyoming, in the State of New York, for his discharge as an insolvent debtor, in pursuance of the statute law of that state, upon which he was discharged; and that he made an assignment by order of the court, in the month of May following. In his schedules, he returned these plaintiffs, as living in the city of Chicago, State of Illinois, creditors by a judgment rendered in the Circuit Court of the United States for the Northern District of Illinois, on a judgment rendered in the court of Chautauqua County, in the State of New York, upon his note to Oliver Patch, of New York, and payable in that state. The judgment in the declaration mentioned was rendered prior to the discharge. To the plea, the plaintiffs demurred, in which the defendant joined.

H. K. Whiton, for plaintiffs.

Knowlton, Pritchard & Jackson, for defendant.

MILLER, J.—In the absence of uniform laws on the subject of bankruptcy, throughout the United States, under the Constitution, the effect to be given discharges under insolvent laws of the states, is a question of embarrassment to the courts, and of interest to parties. The courts of the several states uniformly carry out their own laws, and between some of the states a comity is observed. For these reasons, decisions of the courts of the states in regard to their own laws, or in observance of existing comity, afford but little aid in the determination of the question presented by the pleadings. Decisions of the courts of the United States must be my guide, if I can ascertain them with sufficient certainty. The subject under consideration appropriately belongs to those courts, as it relates to the rights of citizens of different states.

It is understood that, by the insolvent laws of the State of New York, a debt is discharged where the contract was made

within the state; or where the contract was to be performed within the state; or where the creditor, at the time of the first publication of notice, was a resident of the state. Under that law, the Supreme Court of the state held, that the discharge of a defendant from the payment of his debts is an absolute bar to a recovery upon a contract made and to be executed within the state, although the creditor be a non-resident of the state, and neither united in the application for the discharge, nor accepted a dividend of the assets. And if such discharge be granted after a judgment on the contract, the debtor will be relieved on motion, and a perpetual stay of proceeding on the judgment will be granted, the plaintiff being at the time a resident of another state.[1] That decision literally carried out the statute law of the state. There is no question but that, if the note had been held by the payee, or if these plaintiffs had resided in the State of New York at the date of the discharge, and had not previously obtained a judgment in the Circuit Court of the United States, in Illinois, the defendant would have been released from the debt. The release of the debt by the insolvent discharge is the only matter for consideration; the question of lien of either of the judgments is not in the case. The plaintiffs sue upon the judgment record simply as an evidence of debt.

In the case of *Burt vs. Smith*, which was a suit upon a judgment record from a court of this state, founded on a judgment record from the State of New York, this court adjudged the discharge binding on the plaintiff, as he was, at the date of the discharge, a resident of the State of New York, and, as creditor, had joined in the petition to the court for the discharge. In *Clay vs. Smith*, 3 Peters, 411, the plaintiff, a non-resident of the state where the discharge was ordered, having received from the assignee a dividend of the assets, it was held that he was thereby concluded.

In *Ogden vs. Saunders*, 12 Wheaton, 213, it is decided, that an insolvent law of a state, which discharges a party from his debts subsequently contracted, does not impair the obligation

[1] Parkinson *vs.* Scoville, 19 Wendell, 150.

of future contracts between its citizens; but it cannot affect the rights of creditors, who are citizens of other states. The question in that case, as determined by the court was, whether a discharge of a debtor under a state law, was valid against a creditor, a citizen of another state who had never voluntarily subjected himself to the state laws otherwise than by the origin of the contract. The debt had been contracted in the State of New York, where Ogden was discharged, the plaintiff residing in the State of Kentucky. Since the decision of that case, the constitutionality of state insolvent laws as to future debts has not been questioned in the Supreme Court of the United States; and the principle there decided as to non-resident creditors, has been steadily maintained. In *Boyle vs. Zacharie*, 6 Peters, 635, the debt was a contract of the State of Louisiana, and Zacharie the creditor resided in that state. Boyle, the debtor, resided in the State of Maryland, and was discharged under the insolvent laws of that state. It was held that the discharge in the State of Maryland did not affect this creditor. In *Clark's Executors vs. Von Reimsdyke*, 9 Cranch, 153, it is decided that a discharge under the law of Rhode Island, will not protect a debtor against a debt contracted in a foreign country. And in *Cook vs. Moffit*, 5 Howard, 295, the Supreme Court adhere to their previous decisions, and decide that a contract made or to be performed in the State of New York, with a resident of that state, is not affected by a discharge of the debtor in the State of Maryland, where the debtor resided. That case was decided in the Circuit Court of the United States, for the District of Maryland, the state in which the insolvent discharge was made; and the judgment was affirmed in the Supreme Court. Taney, C. J., in his opinion, says that he ruled the case in the circuit court, in obedience to the decisions of the Supreme Court; and he remarks:—"I cannot see how such laws can be regarded as a violation of the Constitution of the United States. For bankrupt laws, in the nature of things, can have no force, or operation beyond the limits of the state or nation by which they were passed, except by the comity of other states or nations. According to established principles of jurisprudence such laws

have always been held valid and binding within the territorial limits of the state by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation. And they have never been considered, on that account, an infringement of the rights of other nations or their citizens. But beyond the limits of the state they have no force except such as may be given them by comity. If therefore, a state may pass a bankrupt law, in the fair and ordinary exercise of such a power, it would seem to follow that it would be valid and binding, not only upon the courts of the state, but also upon the courts of the United States, when sitting in the state and administering justice according to its laws, and that in the tribunals of other states it should receive the respect and comity which the established usages of civilized nations extend to the bankrupt laws of each other." From these remarks it is apparent that the Chief Justice in the Circuit Court for Maryland would have considered the insolvent discharge in that state effectual against the non-resident creditor, if he had not been bound by the adjudications of the Supreme Court of the United States. In that case Mr. Justice Daniel and Mr. Justice Woodbury held that the bankrupt law of a state is a law of the contract and enters into it; and that the *lex loci contractus*, must govern. The position of Justice Woodbury is that "such laws are to be regarded as if part of the subsequent contract, incorporated into it; and hence that the contract, being construed according to the *lex loci contractus* should be discharged by a certificate of bankruptcy given to the obligor in the state where the contract was made and was to be performed. And this, whether the action on it is brought in that state or another, or in the courts of the United States, or those of the states, and whether the obligee resides in that state or elsewhere. Considered as a part of the contract itself, it is inseparable from it and follows it into all hands and all places." Justice Story in *LeRoy vs. Crowninshield*, 2 Mason, 175, and in Story's Conflict of Laws, § 351, seems to approve this position. If this position were tenable, I should not have much difficulty in disposing of the question under consideration; but I am not

disposed to adopt it as a controlling principle. These several positions of Chief Justice Taney, and Justices Daniel and Woodbury are merely cited as modern principles, in regard to discharges under state insolvent laws. And in the reports of the Supreme Court of the United States, it will appear that the Justices from time to time varied in their opinions of these laws, from considering them as laws impairing the obligation of contracts in the sense of the Constitution of the United States, to the extreme positions above cited. But, however they may have differed in their opinions, the law of the court is, that an action of a non-resident plaintiff is not barred by a plea of discharge under a state insolvent law, unless he has abandoned his ex-territorial immunity, by voluntarily subjecting himself to the state laws, otherwise than by the origin of the contract. The question now to be considered is, whether these plaintiffs abandoned this immunity by obtaining the judgment against the defendant in the state of New York.

A judgment is the sentence of the law, pronounced by a court, upon the matter contained in the record. It is a debt of record; and in many respects, is distinguished from a contract. The omission of a joint debtor, in a suit on contract, must be taken advantage of by a plea in abatement; but in a suit on a judgment record, such omission may be demurred to.[1] A suit on a judgment record is considered as in the nature of a *scire facias* to revive a judgment. A judgment record is not evidence of a new contract, but is a debt of record founded on the original contract. At common law a judgment in a personal action could only be revived by a suit, until the *scire facias* was allowed by the statute of Westminster, 2, Chap. 45. Debt lies on a judgment record, upon the principle of a contract implied in law. *Nul tiel record* is the only plea of the general issue; but payment, or release, in fact or law, may be specially pleaded, the same as to a *scire facias*. The action of debt on a foreign judgment is an original and independent action; but the defense is the same as to a suit on a domestic judgment, or to a *scire facias* to revive a judgment.

[1] Gilman *vs.* Rives, 10 Peters, 298.

The judgment in the Circuit Court of the United States for the Northern District of Illinois, was no satisfaction of the judgment in the county of Chautauqua, in the state of New York.[1] But satisfaction of the judgment in New York would authorize the Circuit Court in Illinois, either to order a satisfaction of their judgment, or to order a stay of further proceedings. If either order were made and certified here, there could be no further proceedings in this court. If the defendant had paid the debt, interest and costs of the judgment in New York, on proof of such payment he would be entitled to have satisfaction of the judgment in Illinois entered upon the payment of costs.

Upon the principle of the Constitution of the United States, and acts of Congress, that full faith and credit shall be given in each state, to the judicial proceedings of every other state, an action on the New York judgment could not be maintained against a plea of discharge under the insolvent laws of that state. Judgments when sued on in another state are to be considered of the same force and validity as in the state wherein they were originally rendered.

The plaintiffs voluntarily subjected themselves to the jurisdiction of the State of New York. Their judgment was subject to the judicial authority of that state; and they, in regard to their judgment as an evidence of debt, were bound by the subsequent action of the courts of the state, whether they resided in the state or not. And from the practice and proceedings of the courts in that state, after the discharge of the defendant as an insolvent debtor, it was competent for the court of Chautauqua county, upon motion, to order that no further proceedings be had on the judgment. Whether that order has been made or not does not appear; but we consider it as made. The Supreme Court of Pennsylvania in the *Merchants Insurance Company vs. De Wolf*, 9 Casey, 45, decided, that a suit would lie on a record of a judgment in the State of New York, that had been appealed from, but not superseded; leaving the judgment to be set aside or stayed by *audita querela* or a

[1] Mumford *vs.* Stocker, 1 Cowen, 178.

writ of error *coram nobis*, on a certificate of reversal of the original judgment. The reversal of that judgment was uncertain, and the court proceeded, until the fact of reversal should be certified. In this case the extinguishment of the original judgment as a debt of record is reduced to a certainty.

Chief Justice Nelson in the case of *Van Hook vs. Whitlock*, 26 Wendell, 43, remarks on page 54: "I am not aware that it has been distinctly determined by any case, in the Supreme Court of the United States, that the discharge would not have been a bar against a citizen of another state, where the suit is brought in the court of the state, in which it was granted; and upon a contract made therein posterior to the law." Neither am I aware of any such decision in the Supreme Court of the United States. But we now see that the court of the state of New York has so decided; and as the plaintiffs would be barred of a suit in that state, this court has no right to question the position of the court of that state, that the judgment in the county of Chautauqua, into which the note merged is extinguished as evidence of a subsisting debt. I think the plaintiffs are as much bound by the insolvent discharge of the defendant in the State of New York, as if they had consented to the discharge, and had received a dividend of the assets of the insolvent estate.

The judgment in the United States Circuit Court in Illinois, was founded upon, and, as I have shown, is dependent upon the satisfaction or extinguishment of the judgment in New York. That judgment being rendered before the insolvent discharge of the defendant, cannot be interposed, to deprive the defendant of the legal benefit of his discharge. Such being the legal consequence of that discharge, in regard to the judgments in New York and Illinois, it follows that the plaintiffs cannot maintain this suit, and that the demurrer must be overruled, and judgment entered for the defendant on the plea.

See Green *vs.* Sarmiento, 3 Washington, 17; Bank of the State of Alabama *vs.* Dalton, 9 Howard, 522; Hampton *vs.* McConnell, 3 Wheaton 234; Mills *vs.* Duryee, 7 Cranch, 481; Warren Manufacturing Company *vs.* Ætna Insurance Company, 2 Paine, 502; Steel *vs.* Smith, 7 Watts & Sergeant, 447.—[*Reporter.*

THE ROCKET.

District Court.—District of Wisconsin.—October Term, 1860.

In Admiralty.

1. Objections to Testimony.—When too Late.—Though the answer to a libel is not as full and explicit and distinct as required by rule 27, if no exceptions are taken to it, and the parties proceed to the taking of testimony, objections to the reading of the testimony on the ground of insufficiency of the answer will not be entertained.

2. Exceptions in Bill of Lading.—Where the respondent has shown that the injury was occasioned by a cause excepted from the bill of lading, the burden of proof is thrown upon the libellant, to show negligence or want of reasonable skill and attention.

3. Bad Seamanship—To run at full speed, in a fog, along shore, where a mistake in reckoning might run the vessel aground. The vessel should stop, or slacken speed and heave the line.

4. Duty of Carrier.—Although a dense fog is a danger of navigation, yet the carrier is not excused if the loss occurs by a peril which might have been avoided by the exercise of reasonable skill and diligence.

5. Knowledge of the time required for running between two points on the same side of the lake forms no excuse for continuing the same speed allowable in the open lake.

6. Deflection of Compass—From some accidental or unforeseen cause, may be a danger of navigation, but before the court would consider it an excuse for an accident, it must be clearly shown, by undoubted proof, that the officers of the vessel understood and discharged their full duty

7. The theory of magnetic influence in a fog does not require any consideration from the court.

The libellants shipped on board this propeller, at Buffalo, for Milwaukee, several boxes and packages of goods, which, by the bills of lading, were to be delivered in good order, "the dangers of navigation excepted." It is charged in the libel that through the negligence, carelessness, and improper conduct of the master, his mariners and servants, the propeller was run

aground on the western shore of Lake Michigan; and by reason whereof, she sprung a leak, and the goods were greatly damaged.

The claimant, in his answer, confesses that the propeller was run ashore, and that the goods were greatly damaged; and avers "that the same did not occur by reason of the carelessness of the master and mariners of the vessel, or of any or either of them; but, on the contrary thereof, that the causes of the accident of running ashore or aground, were the dangers of navigation, and the mere act of God."

Finches, Lynde & Miller, for libellants.

Emmons & VanDyke, for respondents.

MILLER, J.—This is not a full, explicit, and distinct answer, as is required by Admiralty Rule 27. But by rule 28, libellants' counsel might have filed exceptions to the answer, which they failed to do. Testimony having been taken on the part of the claimant, without exceptions to the answer, the libellants cannot object at the hearing to the reading of the testimony on account of the insufficiency of the answer. The libellants had notice, by the answer, that the claimant based his defense upon some danger of navigation, or some act of God; and they tacitly permitted him to make specification by testimony.

By Rule 23, the libellant shall propound and articulate, in distinct articles, the various allegations of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article. These libellants are held in the proof to the cause of the damage to their goods, propounded in the libel. The rules of pleading in the admiralty must be strictly complied with. The evidence must be confined to points put in issue by the allegations in the libel, and denial of the answer.[1]

In this answer, the charge of negligence is denied; and the general allegation in avoidance was not excepted to. While

[1] Lawrence *vs.* Minturn, 17 Howard 100; McKinty *vs.* Murrish, 21 Id., 343.

the testimony on the part of the claimant was being taken, libellants' counsel were present; and having full knowledge of the facts proven, they are not taken by surprise, and cannot be permitted to object to the evidence for insufficiency of the answer. The libellants had the power, by rule, to require a full, explicit, and distinct answer before the testimony was taken.

Depositions of the captain, first mate, assistant engineer, and two wheelsmen, were read on the part of the claimant, and their protest was read on the part of the libellants. The claimant founded the defense upon an alleged deflection of the compass, caused either by magnetic influence on shore or in the fog that prevailed at the time of the accident.

Counsel referred to the case of *The Juniata Paton*, decided in this court in December, 1852.[1] It was there ruled that, where a bill of lading contains the clause "dangers of navigation excepted," the carrier brings himself within the clause, when he shows that on a dark and stormy night, at the entrance of a harbor difficult of access, he mistook a light on shore, in a line with the pier light, for the latter, whereby the vessel was run ashore, and part of the cargo was damaged. But the carrier, in order to avail himself of the benefit of the restrictive clause, must bring his case strictly within the words of the exception; and for this purpose the burden of proof is upon him. It there appeared that the steamboat Baltic was making for the same light, following in the wake of the Paton, under the belief that it was the harbor light, and did not discover the mistake until the schooner struck. In the opinion it is remarked: "The exception in the bill of lading, of the dangers of navigation is to be understood in a broader sense than to denote natural accidents." It extends to events not attributable to natural causes. It is extended to excuse the carrier from losses by collision of two ships, when no blame is attributable to his ship. But there is no doubt the carrier should not be excused, if the loss occurred by a peril which might have been avoided by the exercise of reasonable skill and diligence. And

[1] Ante p. 15.

"where the benefit of an exception is claimed from loss being occasioned by a danger of navigation, it is incumbent on the carrier to bring himself strictly within the terms of it. It is by no means unreasonable to require him to prove the loss and the manner of it, and that usual care and diligence had been used to avoid it. This is peculiarly within his own knowledge, or of those in his employment, and under his control. The shipper is in a greater measure in the carrier's power, from the fact of exclusive custody of the goods. The crew of the vessel are usually the only persons cognizant of the matter, and are not expected to implicate themselves; and the owner can seldom have any other account of his property, or of the facts connected with its loss, than what they may choose to give. For these reasons, testimony from those employed on board, in support of the exemption claimed, must be cautiously considered. But, fortunately for the respondent, the testimony of those witnesses is corroborated, in every particular, by the mate of the steamboat Baltic, and other disinterested witnesses."[1] In *Clark vs. Barnwell*, 12 Howard, 272, the Supreme Court of the United States decide that, where goods are shipped and the usual bill of lading is given, promising to deliver them in good order, the dangers of the seas excepted, and they are proved to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was occasioned by one of the excepted causes. And, although the injury may have been occasioned by one of the excepted causes, still the owners of the vessel are responsible, if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper to show the negligence.

Upon these principles of law this cause must be determined.

The propeller was a general ship, in trade between Buffalo and Chicago, stopping at intermediate ports. As such, she was freighted with merchandise, and also with about one hundred and fifty tons of railroad iron, distributed on deck fore and aft. Nothing happened to cause any apprehension of deflection of

[1] Ante p. 17.

the compasses, until the accident happened, near the city of Milwaukee. Port Washington lies about twenty-eight miles, a little west of a due north line, from Milwaukee. The vessel put out from Port Washington for Milwaukee, about two o'clock of the morning of the ninth of July. It was then clear star-light. The vessel was put on her full speed, and so continued until the accident happened. The captain remained on deck about ten minutes after leaving Port Washington, running south-east; when he ordered the mate to change to south, south-east, and to run on that course until out three miles from land, and then run south half east, and went below. That was the first trip of the mate as mate. About half an hour afterwards the captain returned on deck, and was informed by the mate that he was steering south half east, and that he thought he was out three miles from land. The captain ordered her hauled out a little more, and that south by east was high enough. The captain then went below and turned in. It was then clear and star-light, and the west bank could be seen, but not with such certainty as to estimate the distance. Running on those first two courses from Port Washington would require over three-fourths of an hour to make three miles from land; and how long the vessel had been on the last course of south half east, does not appear. When the captain came on deck, she had been out forty minutes, from which it does not appear at all certain that three miles from land had been made; and it is acknowledged that the distance from land could not be reckoned with any certainty at that time. The captain knowing the speed of the vessel, and the mate not being acquainted with the appearance of the land, the order to change the course should have been given with regard to the time out. My impression is, that this order of the captain caused the accident, by leaving the mate in a state of uncertainty. Two vessels afterward met, lying eastward of the propeller, tends to strengthen this impression, one of those vessels lying twenty-five rods to the east. The propeller, from the fact of meeting those vessels, was on her course, but not enough out to clear the north point, as the sequel will show.

The Rocket.

After some time the captain came out again; went to the engine house and found it right; and then to the upper deck, and observed to the mate it was foggy and thick, and advised the mate to stop; then the bells were rung for slower, and then to stop, when they heard a noise which proved to be the surf on shore, and the vessel immediately struck. The captain had not examined the compass. The testimony is that the compass not in the pilot house, called the tell-tale compass, is less exposed to magnetic influence than those in the pilot-house; and there is usually a variation between this compass and those carried in the pilot-house, from two points down to half a point. It is also testified by the mate that this vessel was navigated by the tell-tale compass. The wheelsmen testify that they steered by the compass in the pilot-house; and that five minutes before the vessel struck, the man at the wheel, from Port Washington, who, in consequence of a sore hand, had to do duty with but one hand, was relieved. The vessel struck heading south, about half a mile west of the track necessary for clearing the north point. The last wheelsman had not been apprised of the difference in the compasses; and those in the pilot-house, by which he steered, stood more to westward than the tell-tale compass, by which, the mate testified he navigated the vessel. At one time the vessel was off her course. It was proven that the course was changed four times after leaving Port Washington; and by comparison of the compasses at the two last changes, they varied from three-fourths to a point. The fog was thick, but there was no wind nor sea. It was about day-break when the vessel struck, about three miles north of Milwaukee. By the testimony of the assistant engineer she had on a full head of steam, and was running at the rate of ten miles an hour, when the order to stop was given.

From the evidence, I am satisfied that the captain and mate were incapable and negligent; and that the first wheelsman, from inability, should not have been required to do duty. It appears that he was discharged soon after, on account of his sore hand.

For some time before the vessel struck, the fog had become so thick, that when the captain came on deck, he concluded not to run, and ordered to stop. The vessel then running at full speed, her forward motion could not be stopped before she struck. This shows that the captain considered it dangerous to run in so thick a fog. I have no doubt but it would have been good seamanship to stop; and I think it was bad seamanship to run at full speed at the time, along shore, where a mistake in reckoning might cause the accident that did occur. After the fog came up, it was the duty of the officers of the vessel to stop, or slacken speed and heave the line, particularly as they had concluded they were near the North Point. This precaution might not be required in the open lake or sea, where vessels would not be so likely to be passed, or accidental causes on shore would not be anticipated.

A dense fog is no doubt a danger of navigation. But when a steam vessel is enveloped in a fog, in a river, or a narrow sea, or while running close along the lake shore, the owners are not excusable, if all reasonable means are not used to avoid accidents. The vessel must either be stopped, or her speed must be slackened and the lead heaved, or she must be put out into the open sea, where practicable, and the whistle must be used. The rule, in the cases above cited, is, that the carrier is not to be excused if the loss occurs by a peril, which might have been avoided by the exercise of reasonable skill and diligence. If a collision had occurred with a vessel, the propeller might not be excused, for she was nearing Milwaukee, a place of extensive commerce with a certainty of passing numerous coasting vessels.[1]

The time required for running a steam vessel between ports on the same shore of the lake, is not the only means of ascertaining the port of destination in a fog, and forms no excuse for continuing the same speed that is allowable in the open

[1] The Bay State, Abbott's Admiralty Reports, 235. Bullock *vs.* The Steamboat Lamar, 8 Law Reporter, 275; The Perth, 3 Haggard's Admiralty Reports, 414; The Rose, 2 Wm. Robinson's Reports, 1; The Neptune, Olcott's Reports, 483.

lake. By a proper and constant use of the whistle and bell, vessels can be led into port by some signal on shore.

No blame can be attached to the vessel for having the railroad iron on deck. This was a general ship, engaged in the coasting trade on the lakes; and such vessels are usually in part freighted with iron, distributed on deck fore and aft, and of which shippers are presumed to have knowledge.

It is not alleged that deflection of the compass was caused by the iron on deck. The compasses acted well on the voyage and gave no occasion for apprehending defect or unusual variation.

Deflection of the compass from some accidental or unforeseen cause, may be a danger of navigation; but before the court would consider it an excuse for an accident, it must be clearly shown by undoubted proof, that the officers of the vessel understood and discharged their full duty. I do not think that the theory of magnetic influence in the fog, or the evidence of such influence on the western shore of Lake Michigan requires any consideration on the part of the court.

A decree for the libellants will be ordered.

See The Portsmouth in subsequent volume of these reports. Also as to duty of vessel in fog generally, The Northern Indiana, 3 Blatchford, 92; also Bazin *vs.* Steamship Co., 3 Wallace, Jr., 229.—[*Reporter.*

COX vs. GRIGGS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL, 1861.

PRIORITY OF CLAIM TO INVENTION.

1. It is the right and privilege of a party, when an idea enters his mind in the essential form of invention, to perfect by experiment his original idea, so as not to be deprived of the fruit of his skill and labor by a prior patent, if he is the first inventor; but there must be a reasonable diligence, looking at all the facts of the case.

2. It is necessary, in order to prevent a man from having the benefit of his patent, that another should have first discovered the thing and reduced it to actual practice.

3. If two persons are jointly experimenting and equally meritorious, a doubt should be solved in favor of him who first obtains a patent.

4. "Useful," in the patent law, is in contradistinction to "mischievous:" the invention should be of *some* benefit.

5. The question, as to infringement, is not whether the defendant's machine works the best, but, does it use the plaintiff's invention.

This was an action on the case tried by Judge Drummond and a jury to recover damages for the infringement of letters patent granted to Thomas S. Cox, August 16, 1859, for "an improvement in the mole of drain plows."

A mole plow is an implement of iron, forced by appropriate machinery, in a horizontal direction, below the surface of the earth, in such a manner as to leave behind it a drain hole or tube, the sides of which are formed of compressed earth.

The claim and an extract from the specification are given in the charge of the court.

S. A. Goodwin, for plaintiff.

C. B. Waite for defendants.

DRUMMOND, J.—This case has been so fully argued that it is not necessary to comment on it at much length. The questions of law are few and simple. The main controversy is as to the facts. It is proper, in the first place, to call your attention to the plaintiff's patent. The specifications are brief, and, that you may comprehend them, I will read an extract: "The nature of my invention consists in forming the terra ducts 'B' on either side of the shank 'A' in such a shape as to carry the dirt from the bottom of the ditch to the top, and deposit it in the rear of the shank 'A' which, by means of the elevated end of the mole 'C' entirely closing up the perforation made by the shank 'A' gives a better and stronger arch, owing to its peculiar shape, than any heretofore made." He then, in compliance with the patent law, describes his improved mole plow so that a mechanic could build it. He then states what he claims as follows:

"The peculiar shape of the mole 'C;' by the forward movement of the mole 'C,' the earth is carried from the bottom of the ditch, by means of the terra ducts, from the point of the mole 'D' to the rear of shank 'A' and pressed more densely by the increased earth coming in contact with the convex end of the mole 'C' in the rear of the shank 'A' in such a manner as to make a better arch and more durable than any heretofore made, leaving the bottom of the ditch almost entirely uncompressed; hence, I do not claim anything except the invention of the terra ducts 'B,' ending in the convex on the top of the mole 'C.'"

He claims the peculiar construction as described, of terra ducts on a mole plow with a shank and a convex heel. He claims terra ducts which commence near the front, pass along by the shank, and unite as one duct, and rise gradually so as to compress the dirt in the arch.

His invention consists in putting on his mole the terra ducts in this manner, to produce the arch in the way described. The first point for you to decide is, whether the plaintiff is the first inventor of this improvement.

The letters patent are *prima facie* evidence of this. If the

defendants deny the priority of the invention, they must introduce evidence to rebut the presumption arising from the patent, and in such case, the plaintiff must produce other testimony to establish his priority.

In this case, the plaintiff introduces his patent, dated August 16, 1859. The defendants then prove by witnesses, that in 1853 or 1854, one of the defendants made a sort of model similar to that shown by the plaintiff. One witness saw him, the defendant, whittle one out in Iowa, and another saw it while riding in a wagon with one of the defendants in this state.

The statement of the witnesses is, in substance, that the form of the model was something like the plaintiff's. The model at this time rested on mere theory. We know nothing further of it until 1857, when Merrifield saw some experiments made by one of the defendants.

No more is heard of the defendants' invention until the issue of their patent in November, 1859, subsequent to that of the plaintiff. They do not account for their delay from 1857 to 1859, so that the defendants' proof to rebut the plaintiff's priority consists in the fact that there was a model made by them in 1853, shown to two witnesses, and that in 1857 they made an experiment with one constructed of wood. It is the right and privilege of a party, when an idea enters his mind in the essential form of an invention,—inasmuch as most inventions are the result of experiment, trial and effort, and few of them are worked out by mere will,—to perfect by experiment and reasonable diligence, his original idea, so as not to be deprived of the fruit of his skill and labor by a prior patent, if he is the first inventor. But there must be what we would consider reasonable diligence, looking at all the facts in the case. The defendants do not explain their delay from 1853 to 1857, when nothing was done and the models were not reduced to practice. It is necessary, in order to prevent a man from having the benefit of his patent, that another person should first have discovered the thing and reduced it to actual practice. It is not pretended by the defendants that they reduced to actual prac-

tice the crude model of 1853. On the part of the plaintiff, we have evidence that in 1855 and 1856 he was making drawings of his invention and a model; that he explained the same to his son in 1857, and that in December, 1858, he actually made a model and casting of the mole; that he was continuously experimenting, and was trying to carry out his plan and reduce it to practice, and that he built and put in use his improvement in the winter and spring of 1859. That is all the proof on both sides as to the novelty. The preponderance of proof should be in favor of the plaintiff, but if they were jointly experimenting and equally meritorious, a doubt should be solved in favor of him who first obtains a patent.

Secondly.—You must be satisfied that the invention is a useful one, and of this, slight evidence only is necessary. "Useful," in the patent law, is in constradistinction to "mischievous;" the invention should be of some benefit.

Thirdly.—Have the defendants infringed the invention of the plaintiff?

No's. 1, 2, 3 and 4 are respectively representations of the improvement used by the plaintiff and the defendants.

It is conceded that the defendants' patent does not claim the plaintiff's invention. Have they used it? If so, they have infringed, and the plaintiff is entitled to damages. The question, then, is as to the construction of the defendants' machine; and that resolves itself into the question whether the terra ducts of the two machines are substantially the same. All that is necessary is, that the defendants should use substantially the invention of the plaintiff, and not necessarily the precise form. Is the construction of the defendants' terra ducts substantially the same as in the plaintiff's machine? Do they operate substantially in the same way, and produce substantially the same result? If so, they infringe. You are to judge from the facts as proved, and from the statements of experts. The mere opinions of experts are not entitled to much weight, unless founded on good and satisfactory reasons. In many cases, the testimony of experts is somewhat colored with feelings of a partisan character. The statement of a fact by one

who has seen a machine work, is better, if reliable, than the mere opinion of ever so scientific an expert. The question, too, is not whether the defendants' machine works the best, but does it use the plaintiff's invention? If so, the defendants are liable; if not, there is no infringement. If they operate substantially in the same way,—whether the defendants' mole takes up more or less dirt than the plaintiff's, is of no consequence,—it is an infringement.

Fourthly.—If you believe the defendants have infringed, the amount of damages is for you to determine.

The rule of damages I shall lay down in this case, as, perhaps, on the whole, being the most equitable under the peculiar facts, is, if you find for the plaintiff, that you should give him whatever profits, whatever benefits the defendants have received from the use of his invention. That is a measure of actual damages unattended with difficulty, because it is restoring to the plaintiff what justly belongs to him, and of which the defendants have deprived him.

The jury found for the plaintiff with $115.00 damages.

EMIGH vs. CHAMBERLAIN.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER, 1861.

IN EQUITY.

1. ASSIGNMENT OF RAILROAD REVENUES NOT TRANSFER OF CORPORATE PROPERTY.—An assignment of the revenues of a railroad, and of the use of the rolling stock of the company to a preferred creditor, is not a transfer of corporate entity or property.

2. USE BY ASSIGNEE OF PATENTED BRAKES.—And the use, by the assignee, of cars which have patented brakes attached to them, does not render him liable to account for infringement of the patent, when the brakes have been licensed to the company by the patentee.

3. The assignee uses the brakes as an agent of the company, and not as a purchaser.

This was a bill in equity to restrain the defendant from the infringement of letters patent, granted to Francis A. Stevens, for an improvement in railroad car brakes, November 25, 1851, and assigned to complainant.

The facts sufficiently appear in the opinion of the court.

Ryan & Jenkins, for complainant.

Emmons & Van Dyke, for defendant.

MILLER, J.—The complainant,—as the assignee, for the State of Wisconsin, of a patent right to Francis A. Stevens for a combination and arrangement of levers, link-rods, and shoes or rubbers, whereby each wheel of both trucks of a car on a railway is retarded with uniform force when the brake is put in operation,—brings this bill against defendant for operating, or causing to be operated, the La Crosse and Milwaukee Railroad, in this state, by the use of cars with the improved brakes attached. The defendant sets up a deed from the patentee, Francis A. Stevens, given, previously to complainant's assignment,

to the said railroad company, whereby, in consideration of six hundred dollars to him paid in full satisfaction, he licensed and conveyed to the company the full and exclusive right and liberty of using the said improvement on any or all their own cars, over any part of their road. Defendant further shows that, by an instrument of writing, called by him a lease or mortgage, the company granted to him, for an indefinite time, its entire railroad and road route, together with right of way and depot grounds, and all buildings and property of every description, including the rolling stock, he to operate the road and receive all the revenues, and out of them defray all expenses of operating the road, purchasing additional rolling stock, paying interest of liens, and the residue to apply toward a claim of his own against the company, and when his claim should be paid, either by the company, or out of the revenues of the road, the property to revert to the company. The company were using the patented improvement upon the cars that passed to Chamberlain, and which he continued to use. Chamberlain, after operating the road for some time, under the deed of the company, was superseded by an order of this court appointing a receiver.

The assignment to complainant excepts the license to the company. Whether Stevens would be the proper person to claim damages is not made a question by the pleadings. Can the complainant require defendant to account to him, is the only question submitted.

The deed of Stevens to the company licenses and conveys the full and exclusive right of using the improvement on their own cars. There is no power granted to the company to vest the right in any person, by conveyance or otherwise. It is simply a license.

In order to test the right set up by defendant, we must bear in mind that the railroad company is incorporated by a law of the state, and to such Stevens made the license, and as such, the company made the assignment to defendant. The duties imposed upon the company by its charter, were not fulfilled by the construction of the road. Important franchises were

granted the company to enable it to provide the facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency was provided, as a remuneration to the community for the legislative grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the legislature. Defendant could only operate the road under and subordinate to the charter of the company, and not he, but the company, was liable for the performance of all the corporate duties to the public. He only could perform those duties in the name of the company. The franchises of the company were not, and could not be vested in him. He was nominally substituted for the company in the active use of the road and property.

The corporation, as a creature of the law, must use the franchise granted it, by means of officers of its own appointment, either directly or indirectly.[1]

It is contended, on the part of the complainant, that defendant was a mortgagee in possession, and as such, he held under a title in the nature of a conveyance from the company. This court has uniformly considered the rolling stock of a railroad company as a fixture not liable to levy and sale apart from the realty, and we have placed liens by mortgage of those companies on the same footing as of individuals. In this state the mortgagor is the owner of the premises, until a sale is made in pursuance of a decree of court. The note and mortgage are choses in action.[2] The mortgagor may put the mortgagee in possession of the mortgaged premises, until the debt is paid by receipts of rents and issues; but the mortgagee would not hold adversely to, but under the mortgagor.

Technically, the deed under which defendant held possession of the road, was not a mortgage. The defeasance does not make it a mortgage, as without it the company would have the

[1] The York, etc., Railroad Company *vs* Winans, 17 Howard, 30, 39, and cases cited.

[2] Sheldon *vs.* Sill, 8 Howard, 441.

equitable right to regain possession upon discharging its debts to defendant, and to require him to account. The deed is an assignment of the revenues of the road to a preferred creditor, with the privilege of using the road and property of the company for the mutual interest of the debtor and creditor. The rolling stock and the road at the date of the assignment to defendant were subject to mortgages, whose accruing interest he became obliged to pay out of the revenues of the road. If he replenished the stock, he did so from the same source. The company being insolvent, devised the scheme of placing their property in the hands of defendant, for the purpose of completing the road to La Crosse, paying the annual interest on liens, and satisfying his claim.

Although this court pronounced the arrangement fraudulent and void as to creditors, yet it was valid between the parties, and this suit can be defended under it. The deed to defendant is not a conveyance of the property. The rolling stock was the property of the company in defendant's hands. It might as well be claimed that the receiver appointed by this court should account for the use of the patented improvement, which, I presume, will not be pretended. The receiver holds the property of the company for the benefit of its creditors. Defendant did so with consent of the company for the same purpose. In both cases, the company is the owner of the cars with the patented improvement attached. The company did not divest itself, by its deed to defendant, of its corporate entity or property.

Defendant is to be viewed in the light of an agent and trustee. He was a mere substitute for the company, and his use of the cars was the same as that of the company, and exclusive as to third persons, of other interests in the meaning of the license.

The bill will be dismissed.

THE SENECA.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER, 1861.

IN ADMIRALTY.

A steamboat employed in transporting passengers between ports in the same state, is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852,[1] and the District Court has no jurisdiction.

The facts appear in the opinion.

J. B. D. Cogswell, U. S. District Attorney, for the United States.

W. P. Lynde for respondent.

MILLER, J. It is propounded in the information, that at the port of Superior on Lake Superior, in this district, the Collector of customs for the collection district of Michillmackinac, did seize said steamboat, and now holds her in his custody within the district, as forfeited to the United States for carrying and transporting goods and passengers between the ports of Superior and Bayfield on Lake Superior, within this state, without license and the inspection of her hull and boilers, required by the Act of Congress of July 7th, 1838,[2] and August 30, 1852, and in violation of those acts.

By the information, this steamboat was employed exclusively in transporting passengers and property, between the ports mentioned in the information, which are located on Lake Superior, and within the State of Wisconsin.

It is well settled that the constitutional power of Congress "to regulate commerce with foreign nations and among the

[1] 10 U. S. Statutes at Large, 61.

[2] 5 U. S. Statutes at Large, 304.

several states," does not embrace the purely internal commerce of a state.[1]

The Act of Congress of July, 1838, provides, that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport goods, &c., or passengers in or upon the bays, lakes, rivers or other navigable waters of the United States, without having first obtained from the proper officer a license under existing laws and without the inspection required, under a penalty of five hundred dollars for each violation of the act. And the act of August, 1852, continues this penalty for transporting or carrying passengers, without inspection. The terms of the act embrace the local employment of this steamboat; but the act must be construed according to the constitutional provision as expounded by judicial authority. The steamboat was employed between places within this state. The contract of affreightment with the steamboat Fashion, in *Allen vs. Newbury*, was for the transportation of leather on Lake Michigan, between ports in this state. The contract with the steamboat Lorents, was for a passage on the Mississippi river, between ports in this state. The license required by the act is for carrying on the coasting trade, and the inspection is for the security of the lives of passengers on board of steam vessels. It is evidently an act for the regulation of commerce, under the Constitution. From the decisions referred to, it is apparent that this Court of Admiralty would not have jurisdiction of this steamboat, while engaged as propounded in the information. And it appears very plain that jurisdiction cannot be maintained of this information, for the reason that the steamboat is not alleged to be employed in the foreign or coasting trade, but was running between ports and places within the State of Wisconsin; and she was exclusively within and subject to state regulations and control. The District Court for the

[1] Gibbons *vs.* Ogden, 9 Wheaton 1. Brooks *vs.* The Steamboat Peytona, 2 Western Law Monthly, 518. Whitaker *vs.* The Steamboat Lorents, Id. 520. The New Jersey Steam Navigation Company *vs.* The Merchants' Bank, 6 Howard, 344. Allen *vs.* Newberry, 21 Howard, 244.

State of Missouri, in the *United States vs. The Steamboat James Morrison*, and *the United States vs. the Steam Ferry Boat Pope*, 1 Newberry, 241 and 256, hold the same opinion.

The information will be dismissed for want of jurisdiction.

For further authorities on the subject of admiralty jurisdiction on inland waters, consult The Belfast, 7 Wallace, 624. The Eagle, 8 do. 15. The Flora, Volume 1 of this Series, p. 29. The Celestine, Id. 1.

Maguire *vs.* Card, 21 Howard, 248; Smith *vs.* The Pekin Gilpin, 203; Wilson *vs.* The Ohio, Id., 505; The Sarah Jane, Lowell, 203; The Brooklyn, 2 Benedict, 547; The New World *vs.* King, 16 Howard, 469; Leonard *vs.* The Volunteer, 1 Chicago Legal News, 185; Carpenter *vs.* The Emma Johnson, 1 Clifford, 633.—[*Reporter.*

THE PROPELLER SUN.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—DECEMBER TERM, 1861.

IN ADMIRALTY.

1. A vessel propelled in whole or in part by steam is not liable to a penalty for transporting goods, wares, and merchandise, without inspection of the hull and boilers under the act of Congress of August 30th, 1852.[1] The penalty is alone for transporting passengers.

2. Answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts.

The facts appear in the opinion.

J. B. D. Cogswell, U. S. District Attorney, for the United States.

W. P. Lynde, for respondent.

[1] 10 U. S. Statutes at Large, 304.

MILLER, J. By the information this propeller was seized by the Collector at the port of Milwaukee, on the 6th of October, 1861, for the following causes:

1st. That on the 20th of September, 1861, the propeller did transport goods and passengers from Milwaukee to Goderich, in Canada, without first having complied with an act of Congress, approved July 7, 1838,[1] entitled, "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and the act of August 30th, 1852,[2] entitled, "an act to amend an act," &c., in this, that the hull of said propeller had not been inspected pursuant to the provisions of the ninth section of the last act within one year prior to the 20th of September, 1861. For each of said violations a penalty of five hundred dollars is claimed.

2nd. That on the 28th of September, 1861, the vessel did transport goods and passengers from the port of Goderich to the port of Milwaukee, without inspection of her boilers, and for each violation of the act a penalty of five hundred dollars is claimed.

Respondent answers that the vessel was licensed at Buffalo, and was employed in the business of commerce and navigation between the ports of Chicago and Milwaukee, on Lake Michigan, and the port of Goderich, in Canada. That the hull and boilers of the vessel were inspected at the port of Chicago, and certificate issued on the 19th of September, 1860, and on the 8th of September, 1861, before the certificate had expired, respondent caused an application to be made to the inspectors at Chicago, for the inspection of the hull and boilers of the propeller; and on the 28th of the same month a second application was made.

At the time of the first application the inspectors were absent from Chicago, and at the time of making the second application the inspectors had not the pumps and necessary machinery for making the inspection, and one of the inspectors was then absent. The propeller was inspected at

(1.) 5 U. S. Statutes at Large, 304.
(2.) 10 U. S. Statutes at Large, 61.

Chicago, on the 8th of October following, when a certificate was issued by the inspectors; and there are no local inspectors on Lakes Huron and Michigan.

To the answer, the District Attorney filed exceptions: that respondent has not fully and distinctly answered the libel, and the matters set forth are immaterial and irrelevant.

Before considering the exceptions, it may be proper to inquire what the respondent should answer to. The libel is intended to charge that the propeller is liable to a penalty of five hundred dollars, for carrying goods, &c., and a like penalty for carrying passengers from Milwaukee to Goderich, and similar penalties for carrying goods and passengers from Goderich to Milwaukee, without having been first inspected, as required by the acts of July 7, 1838, and August 30, 1852.

The act of July 7, 1838, (5 Statutes, 304) entitled, "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," directs in section 2: "that it shall not be lawful for the owner, master, or captain of any steamboat, or vessel propelled in whole or in part by steam, to transport any goods, wares, or merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section the owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, the one half to the use of the informer, and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States, having jurisdiction of the offence." The act then directs the appointment and duties of inspectors of hulls and boilers of such boats and vessels.

The act approved August 30, 1852, is an act to amend the act of July, 1838. The first section directs: "That no license, register, or enrollment under the provisions of this or the act to which this is an amendment shall be granted, or other

papers issued by any collector to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment." The whole object and scope of the last act was to provide for the better security of the lives of passengers, and it provides a full and perfect system for the inspection of the hulls and boilers of vessels propelled in whole or in part by steam, and carrying passengers. By the section of the act above quoted, the penalty prescribed in the second section of the act of July, 1838, is continued as to vessels navigated, with passengers on board, without complying with the terms of the act in regard to inspection. The penalty in the act of July, 1838, for transporting goods, wares, and merchandise on vessels not inspected, is not embraced in the act of August, 1852; and by this last act all parts of laws heretofore passed, which are suspended by, or inconsistent with the act, are repealed. That provision in the act of July, 1838, was outside of the object of the act, and in the subsequent act it is entirely omitted. In this respect the two acts are inconsistent, and the provision of the last act must prevail. This is a penal statute, and it must be construed literally. The respondent is not required to answer that part of the libel of information claiming a penalty for transporting, on this propeller, goods, wares, or merchandise, without previous inspection of her hull and boilers.

The exceptions to the answer will have to be allowed, with leave to amend.

The answer neither denies nor confesses the charges. The respondent must fully and explicitly answer the several articles of the libel. He must deny the several articles, or confess and avoid them by a proper allegation of facts.

YORK MANUFACTURING CO. vs. ILLINOIS CENTRAL R. R. CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1862.

1. LIMITATION OF LIABILITY OF COMMON CARRIER.—A common carrier may by special contract, limit his common law liability to that of an ordinary bailee for hire.

2. He cannot, however, go beyond this, or escape liability for misconduct or negligence.

This action was brought to recover the value of one hundred bales of cotton, the property of the plaintiff, which, it is alleged, were lost by the wrongful act of the defendant, in course of transit from Memphis to Boston. Thos. Trout & Sons were the agents of the plaintiff at Memphis in the fall of 1859, and on the 8th of November, purchased 201 bales of cotton on account of the plaintiff. Harris, Hunt & Co. were defendant's agents at Memphis for the purpose of making contracts for the shipment of goods from that place, which might pass over the Illinois Central Railroad or any portion of it.

The facts are further stated in the charge.

Gallup & Hitchcock, for plaintiff.

Scates, McAllister & Jewett, for defendant.

DRUMMOND, J., charged the jury as follows:

I think there can be no doubt of the correctness of this principle, that the defendant, as a railroad corporation of this state could, under the law, appoint agents at Memphis to make contracts for freight to be carried over the road, and for the purpose of this action it is sufficient to regard this as a contract made at Memphis, by Harris, Hunt & Co. with T. Trout & Sons, the agents for the plaintiff, for the transit of the cot-

ton from Memphis to Boston; and inasmuch as no controversy has been made that the cotton was actually in the possession or control of the defendant at Cairo, it is enough for us to know that defendant had authority to appoint an agent to make a contract which would be binding upon defendant the very moment the cotton came into the company's possession at Cairo, or that of its agents, because there it was within the limits of the State of Illinois, and the charter, of course, operated on the subject matter of the controversy.

This being so, it was competent for the defendant, through its agents, to make the same kind of contracts, with the same restrictions and conditions, that they would have made at Memphis. The first question, therefore, to be determined is whether the defendant, through its agents at Memphis, made a contract for the transfer of this cotton from Cairo over its road, and if so, what were the terms and conditions of that contract.

Thomas Trout & Co. acted for the plaintiff; Harris, Hunt & Co. for the defendant. On the 8th of November the shipment took place on board the steamer Adriatic, at Memphis. A bill of lading has been introduced which refers to the cotton as having been shipped by T. Trout & Sons that day on board the Adriatic, for Cairo, to be delivered without delay at the port of Boston, "fire, and the unavoidable dangers of the river only excepted," to Samuel Batchelor, Treasurer, or to his consignee, and paying a freight of $4.75 per bale, from Memphis to Boston, by rail. And Mr. Trout, when asked in relation to his agency and the business transacted, says, " we had shipped the cotton on account of the York Manufacturing Company, on the 8th of November, 1859, 201 bales; the quality was strictly middling, and marked Y. M. Co.—it was put on the steamer Adriatic. We made a contract with Harris, Hunt & Co. to ship the cotton to Boston. They signed a bill of lading, as agreed, for the I. C. R. R. Co."

Now the first question to be determined is, whether this property was shipped under this contract. It is not material as to the authority of Thos. Trout & Sons, from the plaintiff.

They acted as the agents of the plaintiff, and delivered the cotton to the agents of the defendant, to transport it from Memphis to Boston. Then whatever contract Thos. Trout & Sons made was binding on the plaintiff, because, so far as the defendant was concerned, the only persons that acted for the company were Thomas Trout & Sons. If they shipped the cotton under a contract with the defendant, the only contract which could be binding on the defendant was the contract with Thos. Trout & Sons, and whether they were authorized by the plaintiff to make it is perfectly immaterial.

A bill of lading is ordinarily a memorandum of the quantity of the goods to which it refers, and, as such, may be explained, and is not conclusive evidence as to the quantity or quality of the goods; but in addition to being a memorandum of the amount of the goods, it is also a contract, and has precisely the effect of any other contract by which a party acknowledges that he receives goods, and agrees to transport and deliver them at a particular place for a fixed sum. That is what is done by the terms of this contract.

Was this property delivered to the agents of the company, and did they receive and agree to hold and transfer it under this contract? If they did, then, as a matter of course, it is the only contract which is binding upon them. And it is generally true of all transactions of this character, that when property is delivered to a carrier, either by land or by water, and a bill of lading is given, by which the carrier agrees to transfer the property for a fixed price, the bill of lading constitutes the agreement between the parties. If the property was delivered under this bill of lading as the agreement binding upon defendant for transit of the property over its road, then it is the only contract which is binding on them, and we must look to the terms of the contract in order to understand what they were.

In this contract there is an exception to the effect that the company are not subject to loss by fire, that is to say, that the obligations of the carrier did not include that of an insurer. He is responsible for all losses, it is said, except those of God

and the public enemies. It is competent, however, for the carrier to limit his responsibility, and there can be no doubt, particularly in relation to so inflammable a material as cotton, that it is competent for carriers to put limitations upon their liability, so that they will not be responsible for the loss of any cotton in case of fire. There is such exemption in this bill of lading, and if it was under this contract that the cotton was shipped, then by its terms the defendant would not be subject to a loss by fire, except under certain contingencies to be hereafter explained.

At the same time this bill of lading was executed by Harris, Hunt & Co., acting as agents of the defendant, the steamboat Adriatic also executed a bill of lading, and, as it appears, with Harris, Hunt & Co., by which it was agreed that the goods should be transported from Memphis to Cairo, and there delivered to Mr. Abbott, the agent of the defendant, and the price fixed as stated in this bill of lading. They were to be taken at $4.75 per bale and by way of the Illinois Central Railroad.

The steamer Adriatic arrived at Cairo on the evening of the 10th of November, the shipments having been made on the 8th, during the night. Shortly after its arrival they transferred the cotton belonging to the plaintiff, with other cotton, to the barge lying by the side of the steamer. On the following day, November 11, the whole of the cotton was on board the barge, and the barge was fastened to the landing some little distance from where the steamer was lying. Not very long after the barge was placed there the fire was discovered, by which a very considerable portion of the cotton was consumed, and so far as this plaintiff is concerned, there was a loss of one hundred bales.

Now if you find that there was no contract limiting the liability of the defendant in relation to the fire, then the defendant would be responsible for the loss by fire, when the cotton came into its possession. If you shall find that there was a contract which limited the liability of the defendant, and which exempted the defendant from such liability, then the remaining

question is, whether the defendant exercised reasonable care of this property. That is a question of fact for the jury to determine.

It seems to be conceded by the counsel on both sides, and it appears by the evidence we have had before us, that the proper way of transporting cotton is to leave it uncovered. The fact seems to be that if it could be covered completely, so as to prevent all sparks from reaching it, that would be the safest way of transportation; but this is not the general way of transport, and is said to be impracticable. It is found best to leave it uncovered, so that if it catch fire it can be extinguished at the earliest possible moment.

It is for you to say, if you shall find that there was this limitation upon the defendant as a common carrier, and that it was not subject to a loss by fire, in consequence of a special contract, whether the defendant is responsible in consequence of want of due care in the management of this cotton.

You will consider, *firstly*, the value of the property; *secondly*, the character of the property; *thirdly*, the circumstances under which it was placed; and it is for you to say whether there was due care exercised in reference to the cotton. If there was due care, and if there was an exemption, then the plaintiff cannot recover; if there was not due care used by the defendant, then, notwithstanding there might have been an exemption in the special contract, still the defendant would be responsible. If you shall find that the defendant is responsible, the damages will be the net value of the property in the market to which it was to be transported, which, I suppose, would be the value of the cotton at Boston, deducting freight.

It is stated that the cotton was insured by an insurance company in Boston, and that the action is brought by the plaintiff on behalf of the insurance company. That it is competent for the plaintiff to do.

Verdict for defendant.

This case was affirmed by the Supreme Court, in 3 Wallace, 107, where the case is fully stated, and the same principles announced as in the circuit court decision. See authorities there referred to, and also Woodward *vs.* Illinois Central Railroad, *post p.* 447.—[*Reporter.*

CASE vs. BROWN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1862.

1. The claim of Case for the combination of the valve in the seed tube, the valve in the seed hopper, and the lever with its arrangement for re-adjusting the valves as described, construed.

2. PATENTEE NOT CONFINED TO PRECISE FORM OF HIS COMBINATIONS.—Any person who takes the substance, although the form may be changed, violates the patent.

3. PRIOR DESCRIPTION, WITHOUT PATENT.—If a prior invention be described in an application made to the Patent Office for a patent, it can make no difference whether it was actually patented or not.

4. A RESULT OR AN EFFECT CANNOT BE PATENTED,—only the particular mode which the patentee has devised. In this case the patentee can only claim the double dropping by his particular mode.

5. Where the patentee devised, not the various parts, but the whole combination, it is not an infringement to use a part of the combination.

6. DAMAGES.—A clear and simple rule of damages is to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff.

This was an action on the case tried by Judge Drummond and a jury, to recover damages for the infringement of letters patent granted to plaintiff, January 17, 1855, and re-issued November 16, 1858, for an "improvement in seed planters."

The claim of the patent was as follows:

"In combination with a corn planting machine that is constantly moved over the ground, and drops the grain intermittently, the so combining of two slides, one of which is at or near the seed hopper, and the other at or near the ground, or their equivalents, with a lever as that the operator, or attendant on the machine, can open said slides at the proper time to deposit the seed, and prepare a new charge by the double dropping herein specified."

The device used by the defendant was covered by letters patent, granted to him May 8, 1855, and re-issued December 11, 1860.

The claim of the defendant's re-issue was as follows:

"So combining with a lever by which both may be operated, a valve or slide in the seed hopper, and a valve in the seed tube, as that a half motion of the lever by the operator riding on the machine, by which they are operated, shall both open and close the seed passages at regular periods and pass measured quantities only, substantially as described."

The difference claimed by the defendant between the two machines was that the plaintiff attained the result of double dropping of corn in planting by a backward and forward motion of a hand lever, the backward motion being obtained by a weight and recoil spring, acting automatically, while the defendant attained the result by contriving a double seed tube, with the valve hung therein upon a central pivot, whereby but one motion, or a half motion of the lever was required.

The defendant in reference to the construction of the plaintiff's patent, and the originality and novelty of his claim, offered in evidence a machine invented and used in 1852, by Charles Finn, and described in an application filed by him in the Patent Office.

The defendant insisted that the plaintiff's machine was identical with the Finn machine in every respect, both requiring two motions of the lever to produce the result, except that the return motion, in the Finn machine attained by hand, was, in the plaintiff's machine, attained by the recoil spring connected with and forming a part of the lever; and that, in order to uphold the plaintiff's patent, the claim should be construed to cover only such a lever as he described with its recoil and automatic return; and that upon this construction it should be submitted to the jury whether the device of the defendant (he not using the recoil spring) attained the result in a substantially different manner from either the plaintiff or Finn, or whether the plaintiff's claim was not void for want of novelty.

The counsel for the plaintiff asked the court to instruct the jury:

"That the plaintiff, in and by his patent, claims any mode of combining a valve in the seed tube, and a valve in the seed hopper, or their equivalents, with a lever, so that the operator

may, by one operation or the application of one muscular force, carry a charge of corn from the seed hopper into the seed tube, and arrest it at the lower valve and by the same operation or muscular force let out from the lower valve and drop into the furrow a charge of corn, previously dropped and lying at the lower valve.

"That the plaintiff by his patent is not confined to the peculiar means of returning the seed slides which he has adopted in his said model, which is called by the witnesses the automatic element.

"That it appears from the patent that he did not intend to confine his combination to a machine where the operator walked after the machine, drawn by one horse, which he drives, but that he intended to employ it in a machine where he also rode and another drove, if you please.

"That his claim covers any arrangement to operate the valves and lever in a machine of different shape from his model, which will produce the result in substantially the same way, although he may not in the other machine employ the rock shaft and weighted lever, or any automatic element; he may employ some substitute for the automatic element so that he by one operation, or the application of a single muscular force applied to the lever, drops from the lower valve and supplies a new charge to take its place by the same operation or muscular force, as aforesaid, applied to the lever combined with the valve at the seed tube or their equivalents."

The court declined to give the instructions requested, but charged the jury as set forth.

James H. Roberts, S. B. Gookins & J. O. Felton, for plaintiff.

L. Douglas, E. C. Larned & S. A. Goodwin, for defendant.

DRUMMOND J., charged the jury as follows:

The allegation of the plaintiff is that the defendant has violated a combination in machines for planting corn by what is called a double drop, secured by letters patent.

The plaintiff claims that he invented the combination in February, 1853, for which an application for a patent was subsequently made and a patent granted, which was afterwards surrendered and a re-issue taken in 1858. It is this last patent that governs the rights of the plaintiff, although the re-issued patent must stand upon the invention as originally set forth in the first letters patent. The construction of the patent is for the court.

The claim of the plaintiff is combining a seed hopper and seed tube and lever, so that by a slide or valve in the hopper and at the end of the tube, the corn by one operation can pass from the hopper into the tube, and from the tube to the ground, at one instant of time. The corn being placed in the hopper, and the slide opened, a hill of corn is deposited at the end of the seed tube. The machine is then ready to perform its office as it is drawn over the ground, viz: to plant in what are called check rows. The operator or attendant, by means of a mere pressure of the thumb or hand upon the lever, opens the valves in the hopper and in the tube at once, and the corn goes from the tube to the ground, to be immediately replaced by corn from the hopper. The slides or valves are instantly re-adjusted by a spring and weight attached to the lever, and this completes the operation.

So that the claim of the plaintiff consists of the combination of the valve in the seed tube, the valve in the seed hopper, and the lever with its arrangement for re-adjusting the valves as described. In this, the patentee is not confined to the precise form of the combination. Any person who shall take what is the substance of the combination, although the form may be changed, would still violate the patent of the plaintiff.

And the question in all cases of this kind is, whether by mere change of form the substantial, the essential, part of the combination is retained. Perhaps no better criterion can be adopted than to determine whether in the change that is made there is an exercise of mere mechanical skill or inventive power.

If the former merely, then it may with confidence be declared

that the substantial, the essential, part of the combination is not changed; if the latter, then the principle is not the same.

Having ascertained the nature and character of the invention which is secured to the plaintiff by letters patent, the first inquiry is, was the plaintiff the original inventor of the combination which is set forth in his specifications?

The law declares that when a patent has been issued to a party, he shall be presumed to be the first inventor, because certain prerequisites are required before the patent shall issue. But it also declares that a party may contest the right of the patentee by showing that the thing patented has been known or used before. As it is only for some unknown combination or machine that the patent can issue, the defendant has in this case contested the novelty of the invention by the plaintiff, and has alleged that the combination has been known and used before.

He has introduced evidence which, he alleges, tends to establish that fact. It is therefore a question to be determined by the jury, upon the evidence, whether the patentee is the first and original inventor of the combination which he claims. If he is not, his patent must fall, and he can not recover damages in this case. It is alleged on the part of the defendant, in the first place, that there was a machine constructed by Charles Finn, of Laporte, Indiana, in 1852, which had substantially the same combination. Whether the machine of Finn, which has been introduced in evidence, is substantially the same as that of the plaintiff, is a question of fact to be found by the jury.

Finn's machine was not patented, but an application was made to the Patent Office for a patent, and it was described, and if it was substantially the same thing as the plaintiff s, it can make no difference whether it was patented or not.

But the machine of Finn must have been a practical machine, capable of performing the object of the maker. It has been asserted that there were various differences between the machine of Finn and that of the plaintiff. It is said that in the latter, there is the application of but one force to produce the double

dropping referred to, while in the former there are two forces. It is for the jury to say whether the means which the plaintiff adopts to re-adjust the slides are substantially the same as the force which is applied to the lever in Finn's machine, to re-adjust the slides there. It is admitted that by the application of one force there is not a double dropping produced in Finn's machine, as in the plaintiff's machine, but there must be an application of another force. In the one instance this force re-adjusts the slides; in the other they are re-adjusted automatically, as it is termed—that is to say, without the aid of the operator or attendant, but simply by the weight and spring attached to the lever. The material point as to Finn's machine, consists in the fact, as alleged by the defendant, that Finn's machine and Brown's are identical in the manner in which the re-adjustment takes place, and that if the plaintiff's machine and Brown's are identical in this respect, then the plaintiff's is also identical with Finn's. How this may be, is a question of fact to be found by the jury. In order to constitute an infringement of a combination, the whole combination must be used. For instance, the combination of the plaintiff, as already stated, consists of a valve at the end of the seed tube, the valve in the hopper and the lever.

Now admitting that the plaintiff was the first inventor of this combination, and that it is secured to him by letters patent, still any one can use the whole combination except the valve at the end of the seed tube, or the whole except the valve in the hopper, or all except the lever as described, and still not infringe the claims of the plaintiff. In order to constitute an infringement the whole combination must be used, because he claims not the various parts, but the whole combination together. The plaintiff cannot claim double dropping of corn; that is a result, or an effect. He can only claim the double dropping by the particular mode which he has devised. Any one can produce the same results by other and different modes, and still not violate the claim of the plaintiff. In order to constitute a violation, there must be a use of the same method substantially as that adopted by the plaintiff.

As for example, Morse invented a method of writing by means of electricity evolved by the galvanic battery, but it has been decided that any one else can produce the same results by different means. And although he claimed the result, the Supreme Court of the United States held that that was a void claim, and all that he could claim was simply the means by which he produced the result. The claim of the plaintiff has been stated. It will be observed that he claims that he has so adjusted the valves in the seed hopper, in the seed tube and the hopper, and the tube and the lever, as to produce what he terms the double dropping; that a charge of corn shall leave the hopper and the bottom of the seed tube simultaneously. He does not claim in language, what has been termed by the counsel on both sides, the automatic return of the lever, but he claims the kind of lever connected with the hopper, the seed tube and the slides, which has been described in the specifications, and we cannot separate the specifications from "the claim," and we must take the lever as he has described it, and its mode of operation just as though he had distinctly set it forth in "the claim." The court has already stated that the invention of the plaintiff is the so combining these parts as to produce a new and useful result. His invention, then, is not in having discovered a new thing, but a new combination of things, and it consists of the whole combination; so that in order to constitute a violation of the patent, it is necessary that a party use the whole combination, that is to say, the tube, valves and lever combined in substantially the same way as Mr. Case has combined them. If any one of the elements which is necessary to constitute the entire combination is left out, then there is no infringement.

For example: if you take out what is called the flipper at the bottom of the seed tube, or the valve in the seed tube, or the lever, and use the rest without one of these, you would not infringe, because Mr. Case claims the entire combination.

So that in order to constitute an infringement of the letters patent, there must be used, by the defendant, the valve at the end of the seed tube, the valve in the hopper and the lever, all

of these combined and operating substantially in the same way as they do in Mr. Case's machine.

But a mere change of form—for example, in the lever and its mode of operation, the adoption of some equivalent, suggested by mere mechanical skill—would not prevent it from being an infringement; otherwise, if the change were one of substance, and requiring the exercise of inventive power. The only remaining question is as to the damages which the plaintiff may have sustained if the defendant has infringed.

And the court thinks that the clear and simple rule to guide the jury in this case is—if they shall believe from the evidence the defendant has infringed the patent of the plaintiff—to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff.

That would be any profits which he may have derived on a machine constructed between the time of the re-issued patent in November, 1858, and the commencement of the suit in September, 1860. Considerable evidence has been introduced tending to show that the lower valve, or flipper, as it is called, does not add anything materialy to the value of the defendant's machine. If that shall be so, and if it is also true that the defendant has by the use of that valve violated the plaintiff's letters patent, still it is the duty of the jury to give the plaintiff nominal damages.

The jury found for the defendant.

This decision was affirmed by the Supreme Court, 2 Wallace, 320.—[*Reporter.*

THE PAULINE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—APRIL, 1863.

IN ADMIRALTY.

1. EXECUTORY CONTRACT FOR TRANSPORTATION, or for the service of a vessel is not a subject of admiralty cognizance.

2. It is not a maritime contract nor is any lien created upon the vessel thereby.

3. On breach of such a contract the cause of action is purely of common law jurisdiction.

4. The court will dismiss a libel on execptions.

Libel by Daniel Newhall for breach of verbal charter. The facts appear in the opinion.

W. H. Peckham, for libellant.

The cause of action is of admiralty jurisdiction, *in personam* and *in rem*.

1. IN PERSONAM.—The jurisdiction of the admiralty *in personam* in a case of contract depends solely on the question whether the contract be maritime or not, and is entirely independent of the existence or non-existence of a maritime privilege or lien. If such privilege or lien exist, the admiralty then has further jurisdiction *in rem*.

"Admiralty," says Judge Story, "has a rightful jurisdiction over all maritime contracts *in personam*; but in cases of that sort, it cannot proceed *in rem* unless there be a maritime lien, or a positive pledge as security." *The Brig Draco*, 2 Sumner, 180.

"To determine jurisdiction in this country, the inquiry is whether it was a maritime contract and the service to be performed on tide waters; if so, the admiralty has jurisdiction." *New Jersey Steam Navigation Company vs. Merchant's Bank*, 6 Howard, 344.

The subject matter of the contract or service gives jurisdiction. *Waring vs. Clark*, 5 Howard, 441.

If the subject matter of the contract relates to navigation of the seas, though it be made on land, the admiralty has jurisdiction. *Zane vs. The President*, 4 Washington, 453.

As to contracts, the jurisdiction depends on the subject matter, whether maritime or not. *DeLovio vs. Boit*, 2 Gallison, 465.

"The admiralty jurisdiction in cases of contract depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to navigation and commerce. *People's Ferry Company of Boston vs. Beers*, 20 Howard, 401.

In cases of charter-party and bill of lading, the charter-party is not a contract preliminary to a maritime contract, but it is the contract, and the bill of lading mere evidence of the shipping. Abbott on Shipping, 277; see also *Schooner Tribune*, 3 Sumner, 144.

A contract of charter party or affreightment is a maritime contract of which admiralty has jurisdiction. *Morewood et al. vs. Enequist*, 23 Howard 491; *New Jersey Steam Navigation Company vs. Merchants' Bank*, 6 Howard, 334.

The respondents' advocate claims that there can be no personal liability where the ship itself is not liable, and quotes from the quotation of the United States Supreme Court, in *Schooner Freeman, vs. Buckingkam*, 18 Howard, 189.

Now the doctrine of the quoted quotation in the case where it was used was true and is true, *i. e.*, a case of marine tort committed by the master where the court hold the liability of the owners and the vessel to be co-extensive.

And the Supreme Court, after making the quotation, call attention to the subject matter of which it was spoken, and then immediately show that it is not universally true, and proceed to illustrate by cases where the vessel would be liable, and not the owners, and *vice versa*. The falsity of the proposition as a general rule might also be illustrated by the familiar instance

of the right of a master to proceed *in personam* while he cannot proceed *in rem*. Flanders on Shipping, §322, §324. *The George*, 1 Sumner, 151; *Willard vs. Dorr*, 3 Mason, 161; *Hammond vs. Essex Fire and Marine Insurance Company*, 4 Mason, 196.

Also the right of material-men and furnishers of supplies in the home port to proceed *in personam*, but none to proceed *in rem*, unless by virtue of state laws, and not even in that way since the amendment to the 12th rule in admiralty. See *McGuire vs. Card*, 21 Howard, 248; Benedict's Admiralty, 145, 153, §269 and cases cited.

"No doubt," says the United States Supreme Court, in the case of *The General Smith*, 4 Wheaton, 438, "is entertained by this court that the admiralty rightfully possesses a general jurisdiction in cases of material-men; and if this had been a suit *in personam* there would not have been any hesitation in sustaining the jurisdiction of the district court." The jurisdiction *in rem* was sustained in that case by virtue of the state law. The same doctrine is held in the case of *The Draco* before cited.

The cases cited by respondent's advocate, in 18, 19 and 24 Howard, have no bearing on this point, for they were all mere discussions as to the existence of maritime liens; and in this point we are not discussing the question of liens.

2. In Rem.—This court has jurisdiction in this cause *in rem*. *First*, on the ground of a maritime lien—*Second*, on the ground that the contract, being maritime, and the state law giving a lien the admiralty will enforce it.

First,—There is in this case a maritime lien. "In order to give jurisdiction to the admiralty *in rem*, where the contract is maritime in its subject and nature, it is not essential that the ship should have entered on the performance, and that the breach should have occurred in the course of the voyage. Hence, if she refuses to receive the cargo on board when it is at her side ready to be delivered, or the passenger with his baggage when he is ready to embark, the ship is bound and the party aggrieved may proceed in the admiralty *in rem*.

The obligation results directly from the contract, and not from the performance which is simply in fulfillment and discharge of it."

Flanders on Shipping, p. 477, § 506.

See Benedict's Admiralty, 111, 112; New Jersey Steam Navigation Company *vs.* Merchants' Bank, 6 Howard, 392; Cutler *vs.* Rae, 7 Id., 739; The Volunteer, 1 Sumner, 551; Hannah, &c., *vs.* Schooner Carrington, 2 Western Law Mouthly, 456.

This was directly held in the case of the *Pacific*, 1 Blatchford, 579.

Substantially the same state of facts existed in the case of the *Tribune*, 3 Sumner, 145.

There is a lien by virtue of the state law which the admiralty will enforce.

We think we have clearly shown this to be a maritime contract. That being so, and the court having jurisdiction of the contract, it will enforce a state lien.

The General Smith, 4 Wheaton, 438; *Peyroux vs. Howard*, 7 Peters, 324; *Steamboat Orleans vs. Phoebus*, 11 Peters, 175, 183; *Roach vs. Chapman*, 22 Howard, 129.

The statutes of Wisconsin, Taylor's Ed., p 1745, provide: "Every boat or vessel employed in navigating the waters of this state shall be liable for all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed." This section was re-enacted literally in 1859; see laws of 1859, p. 152.

The 12th rule in admiralty, as amended, changes the law in this respect so far as concerns suits by "material-men for supplies or repairs," but no further; and this case, not being one of supplies or repairs, is unaffected by the 12th rule.

3. The respondents *in personam* and the vessel *in rem* are properly joined. Both are liable, and the general rule is that they may then be joined. Benedict, 213-214. So held in the case of *The Zenobia*, 1 Abbott's Admiralty, 48.

Wm. P. Lynde, for respondents, filed the following brief:

1. In England the courts have decided that the court of admiralty has no jurisdiction over contracts of affreightment, whether by charter party, or bill of lading, but that they are solely within the jurisdiction of the courts of Common Law. 1 Conkling's Admiralty Practice, 123, *et seq.*

2. The Supreme Court of the United States has decided that the court of admiralty in this country has jurisdiction over contracts of affreightment when the goods are received on board of the vessel or delivered to the master, and not otherwise; that "if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases."

Vandewater vs. Mills, 19 Howard, 90; *Schooner Freeman, &c. vs. Buckingham et al.*, 18 Id., 188; *Bulkley vs. Naumkeag Steam Cotton Company*, 24 Id., 386.

3. The owner of the vessel is never liable in a suit in admiralty on a contract of affreightment, where the vessel is not liable.

In *Schooner Freeman vs. Buckingham*, 18 Howard, 189, the court says, "And it has been laid down by the high court of admiralty in England (The Druid, Wm. Rob, 399) 'that in all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners in such cases are convertible terms: the ship is not liable if the owners are not responsible; and, *vice versa*, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against.'

See also *The Bold Buccleugh*, 2 English Law and Equity, 537."

The libel cannot be sustained *in rem* and *in personam.*

Dean vs. Bates, et al., 2 Woodbury & Minot, 87; *The Orleans*, 11 Peters, 175; *The Citizens Bank vs. The Nantucket Steamboat Company*, 2 Story, 16; *Bondies vs. Sherwood, et al.*, 22 Howard, 214; *The Atlantic and Ogdensburgh*, Newberry, 157.

No jurisdiction. The vessel is not stated to be engaged in commerce between states.

This is not a maritime contract for a court of admiralty. The contract was a verbal contract on land.

It was a mere preliminary executory contract, not executed.

Vandewater vs. Mills, 19 Howard, 82–90; *The Schooner Freeman*, 18 Howard, 188; *Bulkley vs. Naumkeag Steam Cotton Company*, 24 Howard, 392.

The Zenobia, 1 Abbott's Admiralty R. 48.

If the joining of defendants and vessel is not correct, the libellant will have to proceed *in personam.*

Definition of a maritime contract, *People's Ferry Company of Boston vs. Beers, et al.*, 20 Howard, 400.

Roach et al. vs. Chapman et al., 22 Howard, 129.

MILLER, J.—This libel is brought against the vessel, her master, and owners. The libel propounds, that the said owners of the schooner, by their agent chartered said schooner to libellant, verbally, for a voyage from the port of Milwaukee to the port of Buffalo, to be provided by, and to carry for, said libellant a cargo of eight thousand bushels of wheat, under deck, from Milwaukee to Buffalo, at the freight of eight and one half cents per bushel, to be paid on the discharge of said cargo at Buffalo; said voyage to be made and said wheat taken immediately on the return of the vessel to Milwaukee, she being at the time on her way from Buffalo to Milwaukee; that the vessel reached Milwaukee, and a better offer having been made for said vessel by other parties, the defendants chartered her to other persons, and refused to comply and fulfill the charter to libellant. The libellant sustained damage to the amount of four hundred dollars.

The defendants filed exceptions to the libel, as follows:

1. That the libel does not allege sufficient to give jurisdiction to the court, over the contract or over the vessel.

2. That the cause of action, as laid in the libel, is purely of common law jurisdiction, and not of admiralty.

3. That a proceeding *in rem* and in *personam* is improperly joined.

There is no objection to the contract, as being by parol. It is sufficient for the coasting trade, although a loose way of doing business.[1]

In England, the admiralty has not allowed jurisdiction of contracts of affreightment. The common law courts claimed the jurisdiction. In this country, the Constitution of the United States and the acts of Congress are construed as conferring upon the district courts admiralty jurisdiction of contracts of affreightment. A maritime contract depends on its subject matter, and the courts have jurisdiction of contracts, which relate to the service or employment of a vessel. And contracts of affreightment entered into by the master or agent of the vessel in good faith, and within the scope of his apparent authority, bind the vessel to the merchandise. Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo, until the cargo is shipped under it.[2] In *Vandewater vs. Mills*, 19 Howard, 82, the court lay down and establish the following rules in admiralty, to wit: "Maritime liens are *stricti juris*, and will not be extended by construction, analogy, or inference. Contracts for the future employment of a vessel do not, by the maritime law, hypothecate the vessel. The obligation between the ship and cargo is mutual and reciprocal, and does not take place till the cargo is delivered on board." The opinion of the court expressly repudiates the doctrine, that mere agreements for the service or employment of a vessel may be enforced against

[1] Conkling's Admiralty 131, and cases cited.

[2] Schooner Freeman *vs.* Buckingham, 18 Howard, 182, 188.

the vessel by admiralty proceedings *in rem.* The same principle is reiterated in *Bulkley vs. Naumkeag Steam Cotton Company*, 24 Howard, 386. The master had receipted for the cotton to be carried on his vessel, and placed it on a steam lighter, of which he had control, to be transferred from the warehouse to his vessel, and it was lost by fire. The court held that a delivery of the cotton to the lighterman was a delivery to the master, and bound the vessel, the voyage being considered to have commenced. On page 392, the court remarks: "It is insisted that the vessel is exempt from responsibility, upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court, and in England, in support of the position.[1]

"But it will be seen, on reference to these cases, the doctrine was applied or asserted upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely, the delivery of the cargo. It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel." In the case of *Newhall vs. The Barque R.C. Winslow*, 3 Western Law Monthly 78, decided in this court, the master had contracted to receive on board his vessel for transportation a quantity of wheat from a warehouse, where wheat is weighed in one hundred bushel drafts, tallied by the first mate, and discharged through an iron pipe, extending from the warehouse to the vessel; the second mate being on deck to watch the flow of wheat from the pipe into the hold of the vessel, to shift the pipe, to control the discharge of wheat into the pipe, and to trim the vessel; and through the negligence of this mate seven drafts of the wheat were lost in the river by the parting of the pipe. It was held

[1] Schooner Freeman, 18 Howard, 189; Vanderwater *vs.* Mills, 19 Id., 90; Grant *vs.* Norway, 2 English Law and Equity Reports, 337; Hubbertsey *vs.* Ward, 18 Id., 551; Coleman *vs.* Riches, 29 do., 323.

that the wheat was delivered to the vessel when it passed from the warehouse into the pipe, and that the vessel was liable for the wheat lost. I remarked, "This case is different from a contract merely executory, where there has been no delivery of the goods to the master, nor change of possession, nor effort to deliver. When there is no delivery of the goods, the contract of the master for their transportation creates no lien." In *Hannah vs. Schooner Carrington*, 2 Western Law Monthly, 456, the ship was withdrawn from the trade, and refused further to comply with a contract of affreightment, and the vessel was not liable. The cases here referred to are wanting in the essential particular of delivery to the vessel.

In the great case of the *New Jersey Steam Navigation Company vs. Merchants' Bank*, 6 Howard, on page 392, it is remarked by the court: "Some question was made on the argument founded on the circumstance, that this was a suit *in personam*. The answer is, if the cause is a maritime cause subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract when the contract itself is within its cognizance." In *Morewood vs. Enequist*, 23 Howard, 491, the admiralty jurisdiction of the courts of the United States extends to contracts of charter party, &c., affreightment; and are cognizable in courts of admiralty by process either *in rem* or *in personam*. But no responsibility can attach to the owners if the ship is exempt and not liable to be proceeded against.[1]

It is not necessary to pursue this inquiry any further, notwithstanding the voluminous and ingenious argument of libellant's advocate. The agreement propounded in the libel is cognizable in the common law courts, and is not the subject of admiralty cognizance. It was a mere executory contract for the service of the vessel; or rather an agreement preliminary to a maritime contract. Such contracts must be equally binding on both parties. And it could not be pretended that this court in admiralty would have jurisdiction of a libel against New-

[1] Freeman *vs.* Buckingham, 18 Howard, 182–189.

hall, at the suit of these owners, if he had been the delinquent party.

The state law authorizing proceedings against boats and vessels does not create such a lien as is cognizable in the admiralty, and consequently there is not to be a proceeding *in personam*. By rule 12, proceedings *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessaries. This case does not come within the rule.

In the case of *Vandewater vs. Mills*, 19 Howard, 82, the court dismissed the libel on exceptions. Following that precedent, this libel, for the reasons here given, will be dismissed on the exceptions herein filed.

Nor is a contract to furnish materials for the construction of a vessels even on the shores of tide waters, within the admiralty jurisdiction. Young *vs.* The Ship Orpheus, 2 Clifford, 29.

See The Dick Keyes, *post* p. 408 where it is held that a contract for the use of a barge at a stipulated rate is cognizable in admiralty.

Admiralty has no jurisdiction over a preliminary agreement. Andrews *vs.* Essex F. & M. Insurance Company, 3 Mason, 6.—[*Reporter.*

EMIGH vs. THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1863.

IN EQUITY.

1. Stevens' claim fairly interpreted means the particular combination and arrangement of lever, link-rods and rubbers in a car, as he had described it, so as to produce the described result, viz: the retarding of each wheel of the car when the brake is applied with uniform force.

2. Though all the parts of a combination be old, a new combination, producing a new result, may be patented.

3. A license to a railroad company extends no further than the road which it used or was authorized to construct at the time of the license; it cannot use the patent on lines afterward built or leased.

This was a bill in equity filed to restrain defendants from infringing letters patent for an "improvement in railroad car brakes," granted to Francis A. Stevens, November 25, 1851, and assigned to complainant.

The claim of the patent was as follows: "What I claim as my invention and desire to secure by letters patent, is the combination and arrangement of the levers, link-rods, and shoes or rubbers, substantially as herein described, whereby each wheel of both trucks of a car is retarded with an uniform force when the brake is put in operation."

Stevens' improvement consisted of the addition of an intermediate lever, with which the brake-beam of each truck was connected, the two inner levers of each truck being connected by a link-rod so that a series of levers should be formed, by which the brakes were operated from either end of the car by the brake-wheel, with an equal pressure upon each brake-beam.

The defendants denied the novelty of the invention, and relied upon two prior patents, one granted to Charles B. Turner, November 14, 1848, and one to Nehemiah Hodge, October 2, 1849.

As a part of the history of the art they also put in evidence the Batchelder & Thompson brake, of 1846, patented to Henry Tanner, July 6, 1852, and a brake alleged to have been used by James Milholland, in 1842.

The defendants also claimed the right to use the Stevens brake on their whole road, from Chicago to the Mississippi river, under a license granted to the Chicago and Aurora Railroad Company, by F. A. Stevens, dated June 15, 1853, which covered fifty-eight miles of what is now the road of defendants, two hundred and ten miles having since been created, under the new corporate name of the Chicago, Burlington and Quincy Railroad Company, by consolidation and arrangement with other independent railroad corporations under the statute of Illinois.

S. A. Goodwin, for complainant.

J. M. Walker & J. Cochran, for defendants.

DRUMMOND J.—The Court is of the opinion that there is something different and distinct in the combination of the Stevens brake from that of Turner, of Hodge, of Tanner, or of any of the other brakes that have been brought before the court during the hearing of this case, in this, viz.: That in the Stevens brake the levers are of the same order, and of similar proportions, so that when operated from either end, without any serious wear or strain on other parts of the machinery, it applies all the brakes of the car with equal force to the wheels, and consequently they are all uniformly retarded.

The parts of the combination—the levers, the link-rods, and rubbers,—are all old, but the combination in the manner described by Stevens, is new, and it, the new combination, producing a new result, is a subject of a patent, and this, irrespective of the fact whether or not it contains a part of the Turner or Hodge combination.

The claim of Stevens, fairly interpreted, means the particular combination and arrangement of levers, link-rods, and rubbers in a car, as he had described it, so as to produce the re-

sult, viz: the retarding with a uniform force, of each wheel of the car when the brake is applied.

This is all he claims, and this claim the Court thinks is new and not too broad.

At the time the license was given, June 15, 1853, it was only to the Chicago and Aurora Railroad Company, its successors and assigns, and the reasonable construction of the license is that it extended no further than the road then used, or which the company was then authorized to construct. It did not extend to any and all lines of road which the company, under a new name and organization, might thereafter be authorized to build, to lease, or to use.

An order must be entered referring the case to a master to report the damages, which the plaintiff has sustained, according to the principles here stated.

Upon the coming in of the master's report, at a subsequent term, a decree was entered for complainant for $10,620.

WOODWARD vs. ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1863.

1. BILL OF LADING—WHEN THROUGH CONTRACT.—A steamboat bill of lading for the delivery of goods at a certain point, specifying the rate of freight to a more distant point, is a through contract, and binds the carrier to deliver at the latter point.

2. Although common carriers generally contract for safe transit only over their own lines, there is no valid reason why they cannot contract for the safe conveyance of freight over the different lines of communication to its place of destination.

3. EXCEPTIONS DO NOT ALWAYS EXCUSE CARRIERS.—The exception from fire liability inserted in a bill of lading, does not excuse the carrier in all cases of destruction by fire; he is, notwithstanding, bound to use reasonable care and vigilance, such as an ordinarily prudent man would exercise over his own property.

4. Fire having caught, the carrrier is bound to do all that reasonable and prudent men could, to prevent the entire destruction of the property; otherwise he is responsible for so much as could have been reasonably saved.

5. MEASURE OF DAMAGES—Is the net value of the property at its point of destination, deducting freight. Interest may also be added.

6. WHEN LIABLE FOR PORTION SAVED.—A portion of the goods having been saved from a car, loaded in part with plaintiff's property, and in part with property of other parties, the carrier, in the absence of proof that the portion saved had been delivered to the owners, is liable for that portion in any event

In the fall of 1862, the plaintiffs, who were merchants in Baltimore through their agent, Mr. Meyer, purchased and forwarded to that and other eastern cities from Memphis, Tennessee, considerable quantities of cotton, the transit being over the road of the defendant. At that time Dan. Able & Co. were the agents of the defendant in Memphis, for the purpose of making contracts for the shipment of merchandise, and Graham, Able & Co. were the transfer agents of the

defendant at Cairo, in the shipment of property from the railway to the river, and from the river to the railway.

On the 24th of October, 1862, Mr. Meyer, as agent of the plaintiffs, shipped on the steamboat John H. Dickey, fifty bales of cotton, and took a bill of lading from Dan. Able & Co., as the agents of the defendant, in the following form—the words printed in italics being written—the remainder the ordinary printed form:

"Shipped by Dan. Able, (*for account E. Meyer*) forwarding and commission merchant, Bradley Block, foot of Jefferson street, in good order and condition, on board the good steamboat called the *John H. Dickey*, whereof ——— is master for the present voyage, the following articles being marked and numbered as below; and are to be delivered without delay in the like good order and condition at the port of *Cairo*, (fire and unavoidable dangers of the river only excepted), unto *Graham, Able & Co.*, or to *their* assigns, he or they paying freight at the rate of *two and* 97-100 *dollars per* 100 *lbs. through to Baltimore*, and charges. In witness whereof the owner, master, or clerk of said boat hath affirmed to five bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Memphis the 24 *day of Oct.* 1862.

MARKS.	ARTICLES.	WEIGHT.
L. D. from 1 *to* 50	(50) *Fifty Bales Cotton.*	

Not accountable for condition, Hoops off or Bagging torn, and owner assumes all risk of fire and unavoidable accidents en route to destination.

W. G. Cirode for
Dan'l Able & Co., agents Ills. Central R. R.

For Woodward, Baldwin & Co.,
Baltimore, Md."

A few days thereafter, the cotton, having arrived at Cairo, was placed on what are called platform cars on the railway, and on the 30th of October, while the train which carried the cotton was proceeding from Prairie Green to Ashkum, a station about seventy miles from Chicago, the cotton took fire, from a fire on or near the railway, and was almost entirely consumed.

The plaintiffs thereupon brought an action upon the case against the company as common carriers. The bill of lading

was introduced by the defense, the company claiming that under the exception as to fire they could not be held liable.

Gookins, Thomas & Roberts, for plaintiffs.

McAllister, Jewett & Jackson, for defendant.

DAVIS, J., charged the jury as follows:

There is no question that the agents of the Illinois Central Railroad, at Memphis, did contract with the agents of the plaintiffs for the safe delivery of this cotton, either at Cairo or Baltimore. It is contended by the plaintiffs' counsel that the bill of lading, given in evidence, was only the contract of the parties as far as Cairo; and that from Cairo the general responsibility of common carriers must attach. The court is of a different opinion, and holds that the bill of lading in this case, which is the contract between the parties, and by which their rights are to be determined, binds the defendant to deliver the cotton safely at Baltimore, unless it should be destroyed by fire. Common carriers, whether steamboats or railroads, generally contract for the safe transit of freight only as far as their railroad or steamboat route extends. But there is no valid reason why the Illinois Central Railroad Company, if it chooses to employ agents at Memphis to feed the road, cannot make a contract there for the safe conveyance of freight, over the different lines of communication, to its place of destination.

Evidence has been given tending to show the existence of a custom, at Cairo, for the railroad company to give the steamboat a receipt for goods delivered, and in the absence of such receipt in this case, it is argued that the cotton could not have been received on this bill of lading.

This is a question of fact for you to determine. If it was the intention to send the cotton by way of the Illinois Central Railway, and the jury find that the cotton was actually received on the road, and transported over it in pursuance of the bill of lading in evidence, then the bill of lading is the contract between the parties, and it is immaterial whether the

usual receipt was given at Cairo or not. A bill of lading usually particularizes the articles carried as freight, but it frequently specifies the terms on which the freight is carried, and by those terms the parties are bound. Common carriers, in the absence of express contracts, are insurers of the freight carried by them, and are only exempt from liability, when the injury is the result of the "act of God," or open public enemies. But common carriers have a right to restrict their liability, especially when so inflammable an article as cotton is offered to them for transportation. And in this case, if the jury believe that the cotton was shipped over the Illinois Central Railroad on this bill of lading, then the clause exempting the road from liability for loss or damage by fire, is operative, and binds both shipper and carrier.

It is proved, that on the 30th day of October last, this cotton was burned near Ashkum station, on the Illinois Central Railroad, while on the cars of the road on its way from Cairo to Chicago.

The exemption from fire liability, inserted in a bill of lading, does not excuse the carrier in all cases of destruction by fire. A carrier, notwithstanding that objection, is bound to use reasonable care and vigilance in the transportation of freight, such care and vigilance as an ordinarily prudent man would exercise over his own property; and if, for the want of them, loss occurs, the liability attaches.

If loss results from a fire that could not have been prevented by any reasonable degree of vigilance, and could not have been foreseen by care and prudence, the carrier is discharged.

It is for you, gentlemen, applying the rule of liability to the facts, to determine whether blame attached to the servants of the defendant. You must first decide upon the origin of the fire.

If the fire originated on the east of the road, was smouldering there when the train of cars passed by, and was blown into a flame by the wind caused by the motion of the cars, and could not have been foreseen or guarded against by reasonable care and watchfulness on the part of the employes of the road, then you should find for the defendant.

But if, on the contrary, the cotton was destroyed by a fire which was burning the prairie on the west, running directly to the road, in full view of every one, then it is for the jury to say whether it was not an act of gross negligence to run a train into the fire, or across it. And whether a conductor, who had a proper consideration for the value of the property entrusted to him, should not have stopped his train until all danger from fire had passed.

The evidence is conflicting. It is for you to reconcile it. There is no artificial rule of evidence to control your belief. You should, in weighing testimony, regard the appearance of the witness on the stand, his manner of testimony, the readiness with which he answers cross interrogatories, as well as direct ones; the consistency of his statements with any of the admitted facts of the case, and the intelligence with which he testifies.

If you should come to the conclusion that the fire was communicated to the cotton, without any fault of the servants of the defendant, then you will consider whether, after the fire ignited the cotton, they did all that reasonable men could have done to prevent its entire destruction. After the cotton caught fire they were bound to exert themselves, as fair and prudent men should, to save as much of the cotton as possible. If they did not put forth the necessary efforts to save the burning cotton, then the defendant is responsible for so much of the cotton as could have reasonably been saved.

If the jury should find that the fire was communicated to the cotton by means of such negligence as would be inexcusable in a prudent man when managing his own property, then they will find for the plaintiffs the net value of the cotton at Baltimore, which was its market value there at the time of its loss, deducting freight. The jury will also add interest.

There is evidence that there were two bales of cotton saved from a car loaded in part with cotton for a firm in New York, and which were not delivered either to the plaintiffs or the New York firm. The plaintiffs having entrusted cotton on that particular car, to the defendant, the burden of proof is on

the defendant to show that the two bales saved from the fire did not belong to the plaintiffs.

Having offered no evidence on that point, the jury will, in any event, find for the plaintiffs, the value of those two bales.

The jury failed to agree.

For report of next trial and citation of authorities, see *post* p 447—[*Reporter.*

THE DICK KEYS.

CIRCUIT COURT.—SOUTHERN DISTRICT OF OHIO.—OCTOBER TERM, 1863.

IN ADMIRALTY. ON APPEAL.

1. BARGES SUBJECT TO RULES OF NAVIGATION.—The use of barges having been found indispensable to a profitable navigation of the Ohio and Mississippi rivers in certain stages of the water, they are subject to the rules of navigation.

2. When the articles transported are the same, governed by the same transporting power, whether steam, wind, or the natural forces of the current, the rules of navigation apply respectively to the modes used.

3. Goods, whether conveyed in the body of a steamboat or in a barge attached thereto, are subject to the same guaranties and protection. There is nothing in the addition of a barge connected with a steamboat which changes the character of transportation.

4. A contract for the use of a barge at a stipulated rate, is cognizable in admiralty, and a libel may be maintained against the steamboat using it.

5. The parties having intended to bind the steamer, the court will not restrict the meaning of the words used in the contract, as they tend to the advancement of commerce.

Appeal from District Court.

These were cross actions brought in the admiralty court, which, by the order of that court, were consolidated.

The libellants, Scott & Duble, allege that they are the owners of the steamboat Yorktown No. 2, and of the barge No. 2, which, on the 2d of December, 1854, were lying at the port of

Cincinnati, in the district aforesaid, and that by the usages of navigation on the Ohio and Mississippi rivers, barges are used by steamboats, as appurtenant thereto, for towing up and down said rivers, in the transportation of freight, and also for lightering over the bars in said rivers, at a low stage of water.

That the steamboat Dick Keys, on the second of December, 1854, was a vessel of more than twenty-two tons burden, enrolled, &c., and was employed with barges on the same rivers, between Cincinnati and New Orleans, and that Riley, as master of the steamboat Dick Keys, and on behalf of said steamboat, did, by contract in writing, obligate himself and said boat, to pay to libellants twenty dollars per day for the use of the said barge, commencing on the second of December, 1854, and continuing until said Riley, as master, should deliver to the libellants either of the two barges, Damon or Pythias, which were owned by the steamboat Dick Keys, in thorough repair for business, and that after delivery the steamboat Yorktown No. 2, and the steamboat Dick Keys, should have the use of each other's barges until such time as they could meet and exchange them without injury or loss to either party; and should the libellants not make use of the barge belonging to the steamboat Dick Keys, a fair compensation should be paid by the Yorktown No. 2, until it should be returned to the libellants in as good order as when received.

That on the day aforesaid, the said Riley, as master, took possession of the Yorktown barge No. 2, under the contract, and used the same until after the thirty-first of December, 1854, on which day the barge Damon was delivered to the libellants. And it is claimed under the contract, that the sum of five hundred and eighty dollars are due under the contract by the steamboat Dick Keys, her master and owners.

The District Court allowed a small set-off against the claim of libellants, and entered a decree in their favor for the sum of $556, with interest thereon from time of demand.

Mills & Hoadly, for libellants.

Lincoln, Smith & Warnock, for respondent.

McLEAN, J.—It is contended that this is not a maritime contract, or one of which a court in admiralty can take jurisdiction.

This is admitted to be a proceeding *in rem*, in which the steamer Dick Keys is sought to be made responsible, on the ground of a maritime lien. I am not aware that a question similar to this has at any time been raised. Had the contract been made for the mere towage of one or more barges, for hire, it could not be considered as a maritime contract. But this was not the nature or effect of the contract.

In certain stages of the water in the Ohio and Mississippi rivers, barges have been found indispensable to a profitable navigation. It is sometimes necessary to lighten the steamboat, by placing the heaviest articles in barges. These are so connected with the boat and with its transportation, as to require but one agency. The propelling power is the same, and the rules of navigation apply. Some additional care may be required in the passage of boats on the river, but the governing principle is the same. Should two steamboats unite in ascending or descending the above rivers, there could be no objection, unless greater caution should be required in passing narrow channels.

In Parsons on Maritime Law, 497, it is said, "If a barge is necessary to a steamboat, its hire to it will be regarded as a material furnished for its equipment."[1]

Whether the term equipment be the most appropriate one, to designate the use of the barge, when engaged in transporting a part of the cargo of a steamboat, it may not be necessary to inquire; but when the articles transported are the same, or substantially the same, governed by the same propelling power, whether of steam, wind, or the natural force of the current, the rules of navigation apply respectively, to the modes used. And it is proper here to say that the goods, whether conveyed in the body of the steamboat, or in the barge, are subject to the same guaranties and protection. This, it appears to me, is

[1] Amis *vs.* Steamboat Louisa, 9 Missouri, 621; Gleim *vs.* Steamboat Belmont, 11 Missouri, 112; Steamboat Kentucky *vs.* Brooks, 1 Greene, Iowa, 398.

an important principle, especially in regard to steam navigation on our western rivers.

Steam tugs are used in difficult places on our rivers, and in entering our harbors. In such cases, the governing power being in the tug, it is made responsible for the safety of the charge.

I see nothing in the addition of a barge, connected with a steamboat, which necessarily changes the character of a transportation. On the contrary, I see additional security in such a transportation, from the laws which govern it.

No one can fail to see, from the language used in the libel, and the contract, that the parties intended to bind the steamboat Dick Keys and her owners. And this construction is necessary to give effect to the intention of the parties. And where such is manifestly the object, the court will not restrict the meaning of the words used, as they tend to the advancement of commerce.

There is no pretence that in this case any lien arises from supplies or necessaries furnished the Dick Keys. The contract between the parties covers the liabilities for which the boat may be made responsible, and these do not appear to have consisted in what is appropriately called supplies.

In regard to the terms of the contract for the barges, and the time each was used by the respective boats, and the compensation allowed by the district judge, I see nothing which requires a correction in the decree of the court; it is therefore affirmed.

That coal barges and flat boats are not "boats or vessels" subject to admiralty jurisdiction, was held in Jones *vs.* Coal Barges, 3 Wallace, Jr., 53.

Steamboats and lighters employed on tide waters are within the admiralty jurisdiction, but not ferry-boats, or those engaged in ordinary traffic along the shores. Thackeray *vs.* The Farmer, Gilpin, 524. Ferry-boats running between different states are subject to admiralty jurisdiction and subjects of salvage. Steamboat Cheeseman *vs.* Two Ferry-boats, 2 Bond, 363.—[*Reporter.*

BARRON vs. ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1863.

1. DEATH BY NEGLIGENCE.—NOT NECESSARY TO SHOW PECUNIARY LOSS.—Under the statute of Illinois, of February 12, 1853, it is not necessary that the declaration should contain a special averment, showing the manner in which the next of kin have sustained pecuniary loss.

2. SAME.—The action can be sustained though the next of kin had no legal claim on the deceased for services or support.

3. SAME.—The intent of the statute is not to deprive all persons of its benefits, except those who were dependent on the deceased; nor is it requisite in any case to prove present actual pecuniary loss.

4. INTENT OF THE STATUTE TO MAKE CARRIERS CAREFUL, AND REMEDY DEFECTS IN COMMON LAW.—As against common carriers, the policy of the law was to make them more circumspect in regard to the lives intrusted to their care. At common law they were liable for personal injuries resulting from their fault, but they escaped responsibility if death ensued; to remedy this evil, and provide a continuing responsibility, was the object of the law.

5. RULE OF DAMAGES.—There is no fixed measure of damages, nor any artificial rule by which they can be computed. The jury are in no case to take into consideration the pain suffered by the deceased, or the wounded feelings of surviving partners; but are to form their conclusions upon proof of all the circumstances attending the death, and of the relations existing between the deceased and the widow, or next of kin.

6. Decisions in New York, and of the Supreme Court of Illinois, commented upon.

The facts are sufficiently stated in the opinion of the court.

Clark, Cornell & Norton, for plaintiff.

McAllister, Jewett & Jackson, for defendant.

DAVIS, J.—The declaration alleges that William T. Barron was a passenger for hire from Hyde Park to the city of Chicago; that he was killed by the fault of the defendant; that

he left a will, and the plaintiff is his executor, and that he was never married, but had next of kin who are named. To this declaration the defendants have interposed a general demurrer. By the common law this action could not be sustained. In 1853, a statute[1] was passed in this state, giving a right of action wherever death is caused by the wrongful act of a person or corporation, where, if death had not ensued, the party injured would have been entitled to sue. The act also provides that the action shall be brought by the personal representatives of the deceased, and the amount recovered shall be for the exclusive benefit of the widow and next of kin, and that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin, not exceeding the sum of $5,000.

The defendants insist that the declaration should have contained a special averment showing the manner in which the next of kin have sustained pecuniary loss; that the next of kin of the decedent, being his father and brothers, had no claim on him for support or services, and, therefore, no pecuniary loss could have been occasioned to them by his death. We cannot adopt this view of the law, but think there can be recovery if the deceased left no kin surviving him who had any legal claim on him, if living, for services or support. The cause of action is given in the first section of the act in clear and unmistakable terms. If the injured party by the common law had a right to sue, if he had lived, then, if he dies, his representatives can bring an action. Very few persons on whom an inheritance is cast under the term "next of kin," have any legal claim on their ancestor for support, or can be said *strictissimi juris* to suffer pecuniary loss by his death.

If the intent of the statute was to deprive all persons of the benefits of the law except those who were dependent on the deceased, why use the term "next of kin" at all. It would have been very easy to have used the word "children," and yet, if the defendant's construction of the law is correct, many

[1] Session Laws 1853, page 97; Gross Statutes, chapter 17, § 5.

children who are of age and not dependent on their parents for maintenance, could not recover. Courts must give effect to all parts of a law, if possible.

Here is a statute where the first section, in positive terms, gives the right to sue, and a construction is sought to be given to the second section which would render the right conferred in the first section a barren right in the majority of cases brought into court. Many individuals who lose their lives by the fault of persons and corporations are of age, unmarried, and have no next of kin dependent upon them for support. We cannot suppose that the statute intended to give the representatives of such persons the right to sue in one section, and to make that right nugatory in the second section, by depriving of all damages. The policy of the law was evidently to make common carriers more circumspect in regard to the lives intrusted to their care. They were responsible at common law, if through their fault, broken limbs were the result, but escaped responsibilty if death ensued. To remedy this evil and provide a continuing responsibility was the object of the law. We do not think it requisite, in any case, to prove present actual pecuniary loss. It can rarely be done. If so, the opinions of witnesses would have to be substituted for the conclusions of the jury. The facts which the parties shall prove will generally enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed. The jury are in no case to take into consideration the pain suffered by the deceased, or the wounded feelings of surviving relatives; but are to form conclusions as to the amount of pecuniary injury the widow or next of kin have sustained (subject to the limitations contained in the statute), upon proof of all the circumstances attending the death, and of the relations existing between the deceased and the widow or next of kin. These views are sustained, we think, by the Court of Appeals, and the Supreme Court of New York, on a similar

statute enacted anterior to the statute of this state.[1] The case of the *Chicago and Rock Island Railroad Company vs. Morris et al., administrators, etc.*, 26 Illinois, 400, has been referred to. That was a case where the declaration did not aver that the decedent left a widow or next of kin.

The court decided that the averment was necessary, and remanded the cause, with leave to the parties to amend the declaration. There are some expressions in the opinion of the court which seem to imply that there must be an averment in the declaration showing the manner in which the next of kin have sustained pecuniary loss. This, as has been already seen, we do not consider necessary.

The demurrer is overruled.

See also opinion on trial of this case, *post* p 453.[*Reporter.*

[1] Oldfield *vs.* New York and Harlem Railroad Company, 14 New York, 310; Dickens *vs.* New York Central Railroad Company, 28 Barbour, 41.

LOVEJOY vs. WASHBURNE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER TERM, 1863.

JURISDICTION.

1. An action cannot be maintained in this court against joint contractors where one of them resides in the same state with the plaintiff.

2. If one is not served with process he may enter his appearance and join with the other in a plea to the jurisdiction, and the suit will be dismissed for want of jurisdiction.

Defendant, E. B. Washburne, was a resident of Illinois, and duly served with process. Morrison, a resident of the same state as the plaintiff, was not served, but entered his appearance in the case, and both united in the following plea, in which the facts are set forth.

"And the said Elihu B. Washburne and Dorillus Morrison impleaded, &c., jointly come and say that this court ought not to have or take further cognizance of the action aforesaid, because they say that before and at the time of the commencement thereof, the said Dorillus Morrison was, and from thence hitherto hath been, and still is a citizen of the State of Minnesota, and not of the State of Illinois in manner and form as the said plaintiffs in their said declaration in that behalf have supposed and alleged; and they, the said defendants, so impleaded, &c., further say that at the time when, &c., the said plaintiffs were and are citizens of said State of Minnesota, and that the joint and not the several liability to the said plaintiffs in their said action is in and by their said declaration supposed against the said Elihu B. Washburne and said Dorillus Morrison, impleaded, &c., together with one Cadwallader C. Washburne; and this, the said Elihu B. Washburne and said Dorillus Morrison, impleaded, &c., are ready to verify.

Wherefore they pray judgment whether this court can or will take further cognizance of the action aforesaid.

Sworn and subscribed, &c."

Cyrus Bentley, for plaintiffs.

Kales & Williams, for defendants.

It was formerly held in some of the circuit courts that the averment as to citizenship to give jurisdiction, must be proved in the general issue. The Supreme Court has, however, established the rule that if the defendant wishes to dispute the allegation he must plead in abatement.

Jones et al. vs. League, 18 Howard, 76.

The plea of the general issue is no traverse of the jurisdictional allegations.

Philadelphia, Wilmington & Baltimore Railroad Co. vs. Quigley, 21 Howard, 214.

In all bills in equity in the courts of the United States, the citizenship should appear on the face of the bill, to entitle the court to take jurisdiction, otherwise the bill will be dismissed.

If the citizenship be properly averred, and the defendant means to deny the fact of citizenship, he must take the exception by way of plea, and cannot do it by general answer, for it is a preliminary inquiry.

Where the real parties in the record are not citizens of different states, the court has no jurisdiction.

Dodge, Ex. vs. Perkins, 4 Mason, 435.

A bill in equity to require a judgment lies in the circuit court where the judgment is given, although the original plaintiff resides in, and is a citizen of another state.

Such a bill is not an original suit within the sense of the 11th section of the Judiciary Act of 1789.

Dunlap et al. vs. Stetson, 4 Mason, 349.

Drummond J.—The jurisdiction of the circuit court is founded upon the 11th section of the Judiciary Act of 1789.[1]

[1] 1 U. S. Statutes at Large, 78.

The clause "or the suit is between a citizen of the state where the suit is brought, and a citizen of another state," would in the case of a several or joint and several contract authorize a suit against citizens of another state on their several liability, without joinder of citizens of the same state; but in the case of a joint contract where all parties must be joined, the mere omission to serve process on parties residing in the same state with the plaintiff would not confer jurisdiction. Such parties may at any time enter their appearance and the suit will be dismissed for want of jurisdiction.

See Louisville Railroad Company *vs.* Letson, 2 Howard, 556; Shields *vs.* Barrow, 17 Howard, 141.—[*Reporter.*

OLSHAUSEN vs. LEWIS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1864.

1. WHEN HOLDER OF DRAFT BOUND TO USE DILIGENCE.—If the maker of a draft had a well founded expectation that if presented within a reasonable time it would be honored, the holder must, in order to recover against him, use due diligence in presenting it, and give him notice of its dishonor.

2. BILL OF EXCHANGE?—The following instrument:

"ST. LOUIS, May 10, 1861.

At sight pay to the order of Stilwell, Powell & Co., four thousand dollars, value received, and charge the same to the account of

LEWIS, PAGE & Co.

To the Marine Bank of Chicago, Ill."

———— is a bill of exchange, and not a check.

3. It is payable in the current coin of the country, and not in depreciated bank notes.

4. Oral testimony is not competent to change its legal effect.

5 EFFECT OF HOLDING.—The holder having retained it at Chicago more than a month without presentation, and not having protested it until three weeks after that time, is guilty of such negligence that he cannot recover of the drawer.

The instrument upon which the action was brought was as follows:

"ST. LOUIS, MO., May 10, 1861.

At sight pay to the order of Stilwell, Powell & Co., four thousand dollars, value received, and charge the same to the account of

To the Marine Bank of Chicago, Ill." LEWIS, PAGE & Co.

On the same day on which the draft was drawn it passed into the hands of the plaintiffs by indorsement, and by them it was forwarded to Munn & Scott, of Chicago, with instructions to collect or convert into New York exchange, and remit proceeds. Munn & Scott did not present the draft at all, but kept it until June 13th, and then returned it to the plaintiffs. On the 19th of June it was sent by the plaintiffs to the Merchants' Savings Loan and Trust Company of Chi-

cago, with instructions to present for payment. On the 24th, it was presented, and the Marine Bank tendered depreciated Illinois bank bills in satisfaction, which were refused, whereupon the draft was returned to St. Louis without protest. In the meantime, on or about May 18th, these Illinois bank bills had gone out of circulation. It was again sent to the Loan and Trust Company for presentation, with instructions that, if payment in coin or current money were refused, the draft should be protested. It was presented the second time on the 6th of July. The bank refusing to pay in such funds, the draft was protested, and notice given to the defendants of its dishonor. The defendants claimed to be discharged from liability on the draft, on the ground "that due diligence was not used by the holders in presenting it to the bank for payment," and that "the draft was not protested, and notice given to the defendants of its first dishonor."

The defendants, up to the time of the drawing this draft and its dishonor, were large depositors at the Marine Bank, and it appeared from the evidence, that their deposit account varied from $3,000 to $12,000; that they were men of undoubted responsibility, and that at the time this draft was drawn their credit was of the highest character, and such that a draft of this amount would have been paid by the bank, no matter what was the precise state of their account at the time.

It appeared from the evidence, that at this time, the business in Chicago, and generally throughout this part of the country, was transacted in Illinois bank notes, a depreciated currency, and that there was a great deal of excitement upon the subject of the currency, and that the general tendency of its value was downwards; that the Marine Bank kept the accounts of their customers in the same way precisely that they would have kept them if the currency had been sound and equivalent to gold and silver. They were in the habit of receiving special deposits, and where the currency of the country was left with them, it was placed to the credit of the depositor, and, unless special instructions were given, as a credit in so many dollars and cents. They kept the account, however, in such a way as

to show the nature and character of the money that was deposited; and where gold was deposited, or eastern bank notes, or bank notes of much greater value than Illinois bank notes, the bank held itself responsible to pay the depositor the equivalent. These defendants kept their account with the Marine Bank in the same way that all the rest of the accounts were kept; they deposited these Illinois bank notes, and were credited in the usual way, and the bank held itself responsible to the defendants for the payment of moneys similar, or bank notes similar in character to those which were deposited.

It also was in evidence that if the defendants had drawn a draft or check upon the Marine Bank, payable in gold or in New York exchange, and so specified, if the bank had had the gold or New York exchange, it would have been paid.

The evidence also showed that by a sort of understanding among the bankers and the business community, in order to make a check or draft payable in gold, it should be so specified upon its face, otherwise it was treated as payable in the currency of the community, Illinois bank notes.

A suit was accordingly brought against the drawers by the holders to recover the amount of money specified in the draft.

Cornell & Norton, for plaintiffs.

Kales & Williams, for defendants.

Drummond, J., charged the jury as follows:

The instrument upon which this suit is brought is, in its form, a bill of exchange, and is to be governed by the rules applying to such bills.

Its legal effect is that it is payable in money, in the current coin of the country, and the holder had the right to call upon the Marine Bank, not for depreciated bank notes, but for money, and, on its refusal, to hold the drawers. It is not competent to introduce any oral evidence to change the legal effect of this instrument.

The question then arises. whether these defendants had the

right to draw upon the Marine Bank for this sum of money. If they had, secondly, whether due diligence has been used by the holders of the bill, in its presentment to the drawee.

It is contended on the part of the plaintiffs, that the defendants had no right to draw this draft, for the reason that it is a draft for the payment of $4,000 in good money, and that they had not at that time, or at the time when, in due course of business, it might be presented for payment, this sum in good money on deposit in the bank. I think the true rule on that subject is stated in Parsons on Bills of Exchange, that the drawer should have a reasonable expectation at the time he draws a draft that when it is presented for payment, proper diligence being used in relation to its presentment, it will be duly honored.

It is contended on the part of the defendants, that, under the conceded facts of this case, it is a question of law whether the defendants had a reasonable expectation that this draft would be paid, if presented within a proper time. If they had, then it was incumbent on the holders to present it within a reasonable time, using proper diligence, and, upon its non-payment upon presentation, to give notice to the drawers. Now the testimony upon which it is contended, on the part of the plaintiffs, that they had no reason to expect that this draft would be paid, is substantially, that the kind of money which was deposited was depreciated bank notes, and that, in the absence of any special statement upon the face of the draft, it would not, in point of fact, have been paid by the drawee, at any time after it was drawn. Independent of the usual mode of doing business, which has been detailed by the witnesses, it is also contended that there was an agreement between these defendants and the Marine Bank, that they should receive, on checks which they drew, the same kind of bills that they placed on deposit. There is no direct or positive evidence as to the signing of this agreement by the defendants. There is the evidence of two witnesses, that instructions were given by the officers of the bank, that all the customers of the bank should enter into such an agreement, and that no business should be done with them

unless they did, and a notice was pasted in the bank-book of each customer to that effect, which notice has been introduced in evidence; and it is considered, on the part of the plaintiffs, that the bank-book of the defendants had a similar notice in it, because, from the testimony which has been adduced, that was the course of business, and notice has been given to the defendants to produce that bank-book. They have not done so, and the plaintiffs claim that the presumption in consequence of the non-production of this bank-book, and the other testimony in the case, is that this book had a similar notice pasted in it. I shall leave it as a question of fact to be found by the jury, whether there was this agreement between the Marine Bank and the defendants.

A sufficient consideration for such agreement would be the fact that the Marine Bank agreed to receive these notes on deposit.

It is contended by the defendants, however, that this agreement was done away with by mutual consent before this bill or draft was presented. This would not, however, avoid the effect of the evidence, as to what existed in the minds of the defendants at the time they drew this draft. The question is as to the expectation there was in the minds of the defendants at the time they drew this draft, as to its being paid on presentation. If they had no reasonable expectation, at the time they drew this draft, that it would be paid, if presented within a reasonable time, then they are not entitled to a demand and notice of non-payment; because in such cases it is in the nature of a fraud upon the party with whom the draft was negotiated; but if you shall believe from the evidence, that they had reasonable ground to believe or to suppose that this draft would be paid, then they are entitled to the exercise of due diligence on the part of the holder, and if due diligence has not been used, then the plaintiffs cannot recover from the defendants.

The holders of this draft, Munn & Scott, had no right, upon a supposition existing in their own mind, to decline to present it. There can be no absolute rule laid down with reference to the time in which a bill of exchange shall be presented to

the drawee; that depends upon the circumstances of the case. But where the facts are undisputed, as in this case, it becomes a question of law. This draft might have been sent to any part of the world; it might have been sent to New York or California, or it might have been sent to the East Indies; it might not have reached the Marine Bank for a year, or eighteen months or more, and still it might be it would have been, as against the drawer, presented in reasonable time. Al lthat the law requires is reasonable diligence under the circumstances of the case; but here the draft was sent immediately to the place where it was payable, and where the drawee was; it was retained here a whole month, returned to St. Louis, returned again to Chicago, and presented to the Marine Bank for payment, no notice being given to the defendants of non-payment; and not actually protested and notice given to the defendants till the 6th of July. Under the circumstances of the case, I feel constrained to say that due diligence was not used by the holders in the presentation of the draft; and, if the other fact existed, to which I have already so often called your attention, that there was a reasonable expectation that the draft would be paid, then, there not being due diligence used by the holders, the defendants cannot be held responsible on the draft.

The jury found for the defendants.

For rules as to presentment and notice, consult 3 Kent, 104, *et seq*; 1 Parsons on Contracts, 268; Story on Bills of Exchange, § 324.—[*Reporter.*

HOUGH vs. THE WESTERN TRANSPORTATION COMPANY.

CIRCUIT COURT.—NORTHEN DISTRICT OF ILLINOIS.—JANUARY 1864.

1. REMOVAL FROM STATE COURT.—The United States Circuit Court has no power to issue a writ of *mandamus* to a state court for the removal of a cause. Congress undoubtedly could give them such power, but it has not done so.

2. CANNOT REVIEW DECISION OF STATE COURT.—Under the 12th section of the Judiciary Act of 1789, it is for the state court to decide the questions arising under the petition and this court cannot review its decision.

3. The remedy is by appeal to the Supreme Court of the state, and thence by writ of error to the United States Supreme Court.

4. The cases of The People *vs.* The Judges, &c., 2 Denio, 197, Spraggins *vs.* County Court, &c., Cooke, 160, disapproved.

Application for a writ of *mandamus* against the Superior Court of Chicago.

O. S. Hough commenced two suits in the Superior Court of Chicago against the Western Transportation Company, a corporation created and existing by virtue of the laws of New York, and doing business in Chicago. The corporation filed a plea to the jurisdiction of the court; plaintiff filed replication, and defendant filed general demurrer to replication. The court sustained the demurrer, and held that the replication was no answer to the plea. Thereupon the defendant filed a petition under the 12th section of the Judiciary Act of 1789, which provides that "if a suit be commenced in any state court by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, * * * and offer good and sufficient surety

for his entering in such court on the first day of its session, copies of said process againt him, and also for his there appearing, &c., it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, &c."

Surety was tendered and the other provisions of the law complied with. No objection was made on that ground, but the state court decided that the application was not made in apt time, the defendant having previously entered an appearance, and therefore refused to grant the prayer of the petition. The defendant's counsel contended that the plea to the jurisdiction was not an appearance within the meaning of the statute, and that a petition for removal filed as soon as the state court had decided that the defendant was properly in court and subject to its jurisdiction was in apt time.

Hosmer, Beckwith & Higgins, for plaintiff.

Hooper & Clements, for defendant.

DRUMMOND, J.—An application is now made to this court for a *mandamus* against the Superior Court, requiring it, in the language of the statute, to proceed no further in the case, and to certify the case to this court, so that this court can take jurisdiction of it.

The question is whether under the circumstances of the case the *mandamus* will lie. I think it will not. Of course, in expressing this opinion it is not necessary for the court to determine whether the state court decided properly in refusing the application made by defendant.

The only provisions of law, I believe, upon the subject of *mandamus* by courts of the United States, are contained in the 13th and 14th sections of the Judiciary Act of 1789.[1] The 13th section provides that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original, but not ex-

[1] 1 U. S. Statutes at Large, 80.

clusive jurisdiction. * * * The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or person holding office, under the authority of the United States."

The 14th section[1] provides that "all the before-mentioned courts of the United States," which, of course, includes circuit courts, "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," &c.

It is under this last clause that it is contended that the circuit court of the United States has power to issue a writ of *mandamus* in this case as being a writ agreeable to the principles and usages of law, and necessary for the exercise of its jurisdiction.

It is a little singular that throughout our judicial history there has been, so far as we have been able to ascertain, but one application made to the circuit court of the United States for this writ, where a state court has refused to comply with the 12th section of the Judiciary Act. That case was the case in Tennessee, and is referred to in the case of *The People vs. the Judges of the New York Common Pleas*, reported in 2 Denio, 197. This case grew out of the case of *Kanouse vs. Martin*, 15 Howard, 198, which was commenced in a state court of New York, and where the application was made to the state court to remove the cause to the circuit court of the United States. After the application was made, the plaintiff amended his declaration so as to make the amount in controversy less than five hundred dollars, and thereupon the application was refused. The case went to the highest

[1] 1 U. S. Statutes at Large, 81.

court of the state, and thence to the Supreme Court of the United States. The Supreme Court of the United States reversed the case, on the ground that the application should have been granted, and that whenever it was made, the statute interposed, and declared that, if it was within the meaning of the 12th section of the Judiciary Act, it was not competent for the state court to take any other step in the case, and that it did, after the application was made, by allowing this amendment, and that was an erroneous act. Judgment was therefore reversed, and it was held that it was the duty of the court to look into the whole record and to determine whether the case was within the provision of the 12th section of the Judiciary Act.

That was a case, as I understand it, in which the counsel for defendant, instead of applying to the circuit court of the United States for a *mandamus*, applied to the Supreme Court of the state for a *mandamus*. The opinion of the court was given by Bronson, Chief Justice, denying the application, on the ground that the 14th section of the Judiciary Act gave the circuit court of the United States power to issue the writ of *mandamus*, and therefore the application should be made to that court, and not to the Supreme Court. In this opinion they refer to the only case to which the notice of this court has been directed, which is the case of *Spraggins vs. County Court of Humphries*, Cooke, 160. The Judge says: "I am not aware that any of the federal courts have questioned their power to act in the same manner. If they have power, there is no reason why this court should interfere." He says, also, "I am aware that the court of appeals in Virginia, awarded a *mandamus* to an inferior court in that state, to compel the removal of a cause into the circuit court of the United States.[1] But," he says, "until it shall be settled, that the federal courts want the power to issue all such writs as may be necessary for the exercise of the jurisdiction conferred upon them by the Constitution and laws, this court cannot act without the appearance of making

[1] Brown *vs.* Crippin, 4 Hening & Munford, 173.

an officious tender of its services." It was for this reason that the motion for *mandamus* was refused.

I admit that the case proceeds upon the ground that the proper source to apply to for a writ of *mandamus* was the circuit court of the United States, and not to the state court. The question then is whether that is a proper source. I think that the view of the judge was incorrect.

The rule laid down in relation to writs of *mandamus* by the Supreme Court of the United States is that it shall issue only to an officer, or to a judge, or to a court where the duty to be performed is a ministerial one simply and where the judge or officer has no discretion. When he has a discretion, the only thing the court will do by writ of *mandamus*, is to compel him to exercise that discretion by deciding the question or case without telling him how it shall be decided. It is only where it is a ministerial duty that the court will compel him, by writ of *mandamus*, to perform that duty, as by signing a bill of exceptions, or in relation to any other mere ministerial act to be performed by an officer.[1]

I have no sort of doubt that it is entirely competent for the Congress of the United States to give this power to the courts of the United States, but I think that they have not yet done so. In the case of *Kendall vs. The United States*, reported in 12 Peters, 524, which was very elaborately argued and fully considered, the Supreme Court of the United States, after adverting to various cases, says: "The result of these cases is that the authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act required by a law of the United States is within the scope of the judicial powers of the United States, under the Constitution, but that the whole of that power has not been communicated by law to the circuit courts, or, in other words, that it was then

[1] Life and Fire Insurance Co. *vs.* Wilson's Heirs, 8 Peters, 291; Life and Fire Insurance Co. *vs.* Adams, 9 Peters, 573; *Ex parte* Hoyt, 13 do., 279; *Ex parte* Whitney, Id., 404; *Ex parte* Many, 14 Howard, 24; Commissioner of Patents *vs.* Whiteley, 4 Wallace, 522; Decatur *vs.* Paulding, 14 Peters, 497; United States *vs.* Guthrie, 17 Howard, 284; United States *vs.* The Commissioner, 5 Wallace, 563.

a dormant power not yet called into action and vested in those courts." The question arose there in relation to the power of the United States court in the District of Columbia, and it was as to the exercise of the power by that court that the question came up, but they refer to power existing in the circuit courts of the United States in states, and say that the whole judicial power has not been delegated to the circuit court in the states. So that it seems to be clear that it is competent for Congress to vest this power in the circuit courts of the United States.

The case in Denio is the only case to which the attention of the court has been directed. The question is, whether it is binding and conclusive. I think that it is not, and that the absence of not only all decisions other than this, but of all applications to circuit courts of the United States, is a very strong argument against the exercise of this power.

It may be seen by an examination of the various decisions made by the Supreme Court of the United States, that it is only in peculiar cases that they have exercised this power by writ of *mandamus*. I think that considerable light may be shed upon this case by an examination of the statute, which was passed at a very exciting period of our history,—I mean the act of 2d March, 1833.[1] The third section of that act provided "where suit or prosecution shall be commenced in a court of any state against any officer of the United States, or other person, for, or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right authority, or title set up, or claimed by such officer or other person under any such law of the United States, it shall be lawful for the defendant, in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of said suit or prosecution and verifying the said petition by affidavit, together with a certificate signed by an attorney or counselor at law of some court of record of the state in which such suit shall have been commenced, or

[1] 4 U. S. Statutes at Large, 633.

of the United States. * * * It shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of *certiorari* to the state court, requiring said court to send to the said circuit court the record and proceedings in said cause. * * * And thereupon it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution upon delivery of such process or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court shall be wholly null and void." Of course the statute giving the right to the court also gives, as a necessary consequence, the necessary means to compel compliance with the writ.

So the Congress of the United States could have done in this case. They have not seen fit to do so. They have given certain legal discretion to the judge of .the state court, not that thereby the defendant is deprived of the right which the statute gives him, but that it is competent for the appellate state court to redress the wrong, if wrong has been done to the defendant, by correcting the error of the state court in which the suit was brought. If the highest court of the state will not do that, the defendant has his remedy by writ of error to the Supreme Court of the United States, which would have jurisdiction in such case. All the cases in which the question has arisen have gone to the Supreme Court of the United States in this way, and the error of the state court, where any existed, has been rectified in the Supreme Court.

There is a remark made by Judge McLean in the case of *Gordon vs. Longest*, 16 Peters, 97, which also gives color to the application which is made in this case. That was a case where the writ was originally brought in a state court. Application was made for its removal to the circuit court of the United States. It was refused. The case went to the Court of Appeals of Kentucky, and was sent back. It then went again to the Court of Appeals, and finally to the Supreme Court of the United States. That court held that the appli-

cation for the removal of the cause ought to have been granted, and reversed the judgment of the Court of Appeals for that reason, and directed that the cause should be remanded with instructions that it should be transmitted to the circuit court of the United States. In giving his decision in this case, Judge McLean says, "A more summary redress might have been pursued by the defendant than the one which this court can now give to him."

I concede to the counsel for the application in this case that there can be but little doubt that Judge McLean thought that it was competent for a circuit court of the United States to issue the writ of *mandamus* to the court of the state. That, I think, must be the "more summary" remedy to which the judge refers, but this is a mere *dictum* of the judge; it was not necessary to the decision of the case, and of course is not binding upon any other court as a decision. I have thought, on examining the various cases, that it would not have been the opinion of the Supreme Court if the point had been made before it.

It will be seen from what has been said, that there is a remedy for the party: he is not without redress; he can take his exception; the Supreme Court of the state can give him redress if the lower court has decided wrong, and if that court will not, the Supreme Court of the United States may. It is true this is a circuitous way to have any supposed wrong remedied, but still, I think it is the only way in which it can be done. The Congress of the United States have not seen fit to give this summary remedy by writ of *mandamus*, if it was competent for them to do it, and until they have done that, either by express language or by necessary implication, I do not think that this court ought to exercise a doubtful power.

The application will therefore be dismissed.

See *In re* Cromie, July, 1869, in subsequent volume of these Reports, where it is also held that the act of July 27th, 1866, made no change as to the power of the circuit court to issue a *mandamus* to a state court.

See also Fisk *vs.* The Union Pacific R. R. Co., 6 Blatchford, 362; Sweeney *vs.* Coffin. 1 Dillon, 73; Sands *vs.* Smith, Id., 290; McBratney *vs.* Usher, Id., 367; Practice on removal to United States Courts; Hatch *vs.* Chicago R. I. and P. R. R. Co., 6 Blatchford, 105; Winans *vs.* The McKean Railroad and Navigation Company, 6 do., 215.—[*Reporter.*

UNITED STATES EX REL. DE LOYNE VS. DAVIDSON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1864.

MARSHAL'S BOND.

1. The United States Courts have jurisdiction in all cases of marshal's bonds, irrespective of the citizenship of the parties, and this jurisdiction rests on the ground that within the meaning of the Constitution they are cases under the laws of the United States.

2. Although the courts had no authority to maintain actions in this class of cases, until Congress exercised the power to give jurisdiction, the act of April 10th, 1806, having provided for suits on marshal's bonds, this jurisdiction is established.

3. Under this act it is optional with the injured party to bring the suit on the bond in his own name, or in the name of the United States, and the United States is not substantially a party to the record.

Motion to dismiss a suit upon a marshal's bond, on the ground that the court has no jurisdiction, the allegations in the declaration concerning the citizenship of the parties not bringing the case within the 12th section of the Judiciary Act.

C. A. Gregory, for plaintiff.

William C. Goudy, for defendant.

DRUMMOND, J.—This is a suit on the bond of J. W. Davidson, formerly marshal of this district, and his sureties, in the name of the United States, for the benefit of George DeLoyne, whose interest alone is affected. It is averred in the declara-

tion that DeLoyne is a citizen of the State of Illinois, and also that Davidson and his co-defendants are citizens of the same state.

This is a question of great nicety, and I have come to the conclusion that the action can be maintained. I will state, very briefly, the grounds of my opinion.

I assume that the party really in interest here is the person for whose use the suit is brought; that he is to all intents and purposes the plaintiff in the suit. By the terms of the Judiciary Act of 1789 the marshal, before he enters upon the duties of his office, must give bonds in the sum of twenty thousand dollars for the faithful performance of his duties, with securities satisfactory to the judge. The original act makes no provision as to suit upon the bond. The act of 1806 makes such provision.

It is necessary to advert to the language of the Constitution as to the power existing in courts of the United States to maintain actions. The second section of the third article of the Constitution declares: "The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made, or which shall be made under their authority." The language of the Constitution is that judicial power extends, among other cases, to cases arising in law and equity under the laws of the United States.

It has been maintained with a good deal of force that this was a self executing provision; that when the courts of the United States were established by act of Congress, this provision of the Constitution operated directly to vest jurisdiction in courts of the United States. That has not been the construction which has been given to this section of the Constitution, but the construction has been that it was necessary that there should be an act of Congress to vest in the courts authority to maintain actions in a particular case, and that, unless Congress did give jurisdiction, no jurisdiction actually existed; accordingly, Congress has, from time to time, vested in the courts of the United States jurisdiction in this class of cases, as it is a dormant power that springs into life only by virtue of an act of Congress.

The law of April 10th, 1806,[1] provides that "The bond heretofore given, or which may hereafter be given, by the marshal of any district, for the faithful performance of the duties of his office, shall be filed and recorded in the office of the clerk of the district court, or circuit court, sitting within the district for which such marshal shall have been appointed." The second section provides that "it shall be lawful, in case of the breach of the condition of any such bond, for any person, persons, or body politic, thereby injured, to institute a suit upon such bond, in the name and for the sole use of such party, and, thereupon to recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for such party in due form; and, in case such party shall fail to recover in the suit, judgment shall be rendered and execution may issue for costs in favor of the defendant or defendants, against the party who shall have instituted the suit, and the United States shall in no case be liable for the same."

This court has held in cases which have been formerly considered, that this was, to all intents and purposes, a suit for the sole use and in the name of the party whose interest is affected—in this particular case for the sole use and in the name of George DeLoyne; and that it was competent to use, nominally, the name of the United States in instituting the action. It is not compulsory to institute the suit in the name of the person who has been damnified, without the name of the United States—but that the common law right still exists to use the name of the United States for the use of the party.

It is impossible to avoid the conclusion, enforced in the several decisions, that the United States are not substantially the parties upon this record. In the case of *McNutt vs. Bland*, 2 Howard, 9, the Supreme Court of the United States held that McNutt was not, within the meaning of the law of Congress, the party upon the record. But that was a suit upon a sheriff's bond given to the governor of Mississippi, and the party really on the record was the party who was damnified, and for whose benefit the suit was brought. The court main-

[1] 2 U. S. Statutes at Large, 372.

tained the jurisdiction. This being so, it would follow that, in this case, the United States are only nominally a party.

It resolves itself into this: Whether it was the intention of Congress, by the second section of the act of 1806, to vest in the courts of the United States jurisdiction where suits were brought on marshals' bonds, on the ground that within the meaning of the language of the Constitution, it is a case under the laws of the United States. It is clear that the laws of the United States determine absolutely as to the responsibility of the marshal and his securities. I have come to the conclusion that it was the intention of this act of Congress to vest jurisdiction in the United States courts in all cases of marshals' bonds, irrespective of the citizenship of the parties. It will be observed Congress does not use the language it sometimes uses —that suit may be instituted on such bond in any court having jurisdiction of the same, state or national, but the language is "to institute the suit upon such bond in the name and for the sole use of the party." Is it presumable that Congress, in using this language, intended to apply it to the courts of the states? Is it not, on the contrary, a natural presumption that it was to apply to the courts of the United States over which they had supreme control? Was Congress speaking of state courts, where it declared that judgment shall be rendered and execution may issue for such party in due form? Was it not intended to apply to courts of the United States? I think it was, and that Congress was giving directions to the courts of the United States, and that it was the intention of this act of Congress to vest in United States courts jurisdiction in this class of cases.

The third section strengthens this view of the case. It provides that "the said bonds shall after any judgment or judgments rendered thereon, remain as a security for the benefit of any person, persons, or body politic injured by breach of the condition of the same until the whole penalty shall have been recovered, and the proceedings shall be always in the same manner and as hereinbefore directed." Then comes in the declaration in relation to the limitation of actions.

This is the conclusion I have arrived at on this subject.

The argument from inconvenience is very strong in favor of this construction of the act of 1806. If it was the intention of the act of Congress that suit could be brought in the state courts only, on these bonds, it is easy to see it would give rise to conflicts of jurisdiction and questions as to the right of priority of claims. It is true that the language might have been more precise and distinct. It might have specified the courts in which suits were to be instituted; but it has not done so, and the only question is whether it was contemplated by the framers of this law that suits should be instituted in the courts of the United States. I think that is a fair infer ence from the various provisions of the act.

The motion will be overruled.

STAFFORD vs. WATSON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1864.

ABANDONMENT OF LIEN FOR DEMURRAGE.—The owner of a vessel, having abandoned his lien on the cargo for demurrage, cannot maintain an action for damages against the shippers, who were merely agents.

Appeal from decree of the District Court, dismissing the suit.

The facts are stated in the opinion.

DAVIS, J.—This is a suit, *in personam*, brought to recover damages, in the nature of demurrage, on account of the alleged detention of the brig Banner, owned by libellant, at Port Colborne. The cargo of the brig was corn, which was shipped on the 1st of May, 1863, at Chicago, by the respondents, as agents and forwarders, and consigned to H. Stearns, Montreal, in care of the Welland Railway Company, at Port Colborne, and was

to be delivered at Port Colborne at the agreed rate of seven and a half cents per bushel. Outside of the terms of the bill of lading, there is proof that the respondents had no interest whatever in the corn, having purchased it for the consignee for a small commission. The brig arrived at Port Colborne in due course of navigation, and was detained there some eleven days, because the railway company could not receive the cargo. The vessel, on her arrival at her place of destination, could have been unloaded in twenty-four hours if the usual and proper facilities had been furnished, and when the master ascertained that he would be detained unreasonably, he telegraphed the fact to the libellant, who called on the respondents, and wished them to consent that the destination of the brig should be changed to Buffalo, or some other port where she could be unloaded with dispatch. They replied that they had no power to authorize such a change; that they had purchased the grain for their correspondent in Montreal, and had no interest in it; but were, nevertheless, willing to write to Montreal for instructions. It does not appear in proof that such a correspondence was opened, or that the libellant wished it done.

The vessel, after a detention of over eleven days, voluntarily delivered her cargo, getting pay for freight, but not for demurrage. Time is often of great importance in commercial transactions, and, during the season of navigation, the owner of a vessel suffers damage for every day that she is unreasonably detained. The owner of the cargo is bound to furnish all reasonable facilities for unloading, when the port of delivery is reached, and, for a non-performance of this obligation, the injured party has his remedy under the name of demurrage. If demurrage was due at all there was a lien on the property, and the master could well have refused to deliver it without payment for his detention. But this lien, if one existed, was abandoned. No attempt has been made to fasten liability on the owner, but it is sought in this action to charge the respondents in person. This cannot be done. The bill of lading disclosed that the shippers were agents, and had no concern with

the property. The fair interpretation of the contract is, that the owner was to be held responsible for all defaults, and not the shipper.

If the owner was a foreigner, yet the vessel had the remedy in its own hands. To hold that an agent who buys produce and ships it for another, having no concern with it afterwards, is responsible for the damages growing out of a failure of the owner to cause delivery within a reasonable time, without an express stipulation, would be effectually to end all purchases on commission.

With such a liability hanging over him, no one, in view of the limited compensation received, would engage in the business. There is always more or less detention at Port Colborne, and it is very easy for carriers, if they wish to contract for the personal liability of the shippers, beyond the lien on the cargo, to provide for it by express stipulation in the bill of lading.

In this case the carrier not only had a lien on the property for his freight, but for the delay in procuring a delivery of the property; and, having voluntarily chosen to abandon this lien, he cannot now seek to charge a party who had no interest in it, and no control over it.

The judgment below is affirmed.

THE RICHARD MATT.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1864.

IN ADMIRALTY.

1. WHEN SEAMEN BOUND TO WORK ON SUNDAY.—Seamen on a vessel not in harbor, refusing to work on Sunday unless they are allowed double pay, which was not a part of their contract, but simply a custom of the port near which they happened to be, are guilty of disobedience, and may be discharged by the captain.

2. The vessel being at anchor in a place where there was danger in case of a change of weather, the sailors had no more right to refuse to work than if they had been on the open lake.

3. In this case partial compensation was allowed, because of abuse by the captain.

The libellants shipped, under the usual articles, on the 12th of October, 1863, for a trip from Chicago to Oconto, Green Bay, Wisconsin, and back at $2.25 per day. The schooner arrived at Oconto on the 17th of October, in the evening, and anchored at some distance from the shore. The next day was Sunday. About 2 o'clock in the afternoon, the captain ordered the crew to hoist some pork which was in the hold, preparatory to being unloaded in scows the next morning. The men refused to work unless they were allowed double pay. This the captain declined to give, and no work was done. The captain then went into the forecastle on Sunday evening, and, though it was very cold, took out the stove and all the bedding and bedclothes, leaving the libellants and the rest of the crew to pass the night in the forecastle upon the floor, on the deck, or upon the boards of the bunks, without any clothes or bedding of any sort. The libellants declined to go to work the next morning, and went ashore, the captain having given them to understand, the day previous, that he should discharge them.

L. Proudfoot, for libellants.

Robert Rae, for defendants.

DRUMMOND, J.—I think the men had no right to refuse to obey the orders of the captain. The vessel was not in a safe place, but was at anchorage where there was more or less danger in case of a change of weather, and the double pay for Sunday's work cannot be considered a part of the contract under which these men shipped. The very fact that the men demanded double pay, and consented to go to work if double pay was given, shows they did not understand it as a part of the contract, but simply claimed it because they were at Oconto, where, it was alleged, the custom was, if they worked on Sunday, they should have double pay. If it was a part of the contract, they ought to have done the work and relied upon the contract. It is not a case of a vessel in harbor, moored to the wharf, or with a safe anchorage, free from the winds and tempest, but where the vessel was in an exposed condition, and the sailors had no more right to refuse to work on Sunday there than if they had been on the open lake. Again, they did not refuse to work for the reason that they were doing violence to their conscience. All that they wanted was double pay.

The captain had a right to discharge them for this disobedience, and, if he had contented himself with doing that at the proper time, and under the proper circumstances, I should have refused all compensation to the men, on the ground of forfeiture of wages for the disobedience. But the act of disobedience was under claim of right. The seamen insisted that, under the custom that existed there, the captain could not call upon them to work under that contract, and that it was optional with them whether they should work or not. The captain was guilty of a rather contemptible mode of punishment by depriving them of necessary comforts when the weather was inclement.

Under the circumstances, the libellants will be allowed their wages from Chicago to Oconto, and their fare back to Chicago.

When wages of seamen forfeited, and power of master to remit. The ship Mentor, 4 Mason, 84; Orne *vs.* Townsend, 4 Mason, 541.

What cruelty and threats from the master justify a seaman in leaving the ship. Bush *vs.* Schooner Alonzo, 2 Clifford, 548.

What disobedience and insubordination will justify a discharge. Jones *vs.* Sears, 2 Sprague, 43.—[*Reporter.*

BUTTRICK vs. HARRIS.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL TERM, 1864.

1. USURY.—Where a contract is simply for a loan of money, and the capital is to be returned at all events, any profit made, or loss imposed upon the borrower in addition to the legal rate of interest, is usury, no matter what form or disguise it may assume.

2. A promissory note made and payable in the city of Milwaukee, with interest at the rate of twelve per cent. and exchange on Boston, not exceeding one per cent., is on its face usurious under the laws of Wisconsin, and the mere fact of the residence of the payee being in the State of Massachusetts, near Boston, is not evidence that the exchange was added for the accommodation of the maker.

3. ADDING EXCHANGE NOT NECESSARILY USURY.—*It seems*, however, that where an addition is made for the price of exchange, not for the loan or forbearance, but as compensation for accepting payment in a place less convenient or where money is less valuable, the contract may be lawful.

The note in suit was given by defendants, John S. Harris and Albert B. Harris, to the plaintiff, in the city of Milwaukee, by which they promise to pay to the order of the plaintiff, two years after date, at the Marine Bank, in said city, three thousand dollars, with interest at the rate of twelve per cent. per annum, said interest payable semi-annually with exchange on Boston, on said principal, and interest not exceeding one per cent.

It appeared in evidence that the plaintiff resided in the State of Massachusetts, near Boston, that he had money loaned out in Milwaukee, which on being collected by his agents was borrowed by the defendant, John B. Harris, and for which the

note in suit was given. There was no express proof that the note was made payable in Milwaukee with exchange on Boston, corruptly, or for usurious interest, or for the accommodation of the borrower at his request.

D. G. Hooker, for plaintiff.

Emmons & Van Dyke, for defendants.

MILLER, J.—The law of the State of Wisconsin, under which the contract was made, prohibited all corporations and persons from taking directly or indirectly any greater sum for the loan or forbearance of money than twelve per cent. And all notes or securities, whereby there was reserved or secured a rate of interest exceeding twelve per cent., were declared to be valid and effectual to secure the repayment of the actual sum loaned without interest. The present law of the state limits the rate of interest to seven per cent.

It is well settled that upon a contract for the loan of money the lender is not at liberty to stipulate even for a contingent benefit beyond the legal rate of interest, if by the terms of the agreement, he has a right to the repayment of the money loaned with the legal interest thereon, at all events.[1]

A stipulation even for a chance of advantage beyond legal interest, is illegal. Courts will not lend their aid to enforce an unlawful contract.

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws, which limit the lender to a specified rate of interest. It was conceded that exchange between Boston and Milwaukee was uniformly in favor of Boston. Reserving interest as discount is unlawful.[2] A contract for the purchase of an annuity may be infected with

[1] 2 Parsons on Contracts, 403, 405; Cleveland *vs.* Loder, 7 Paige's Chancery R., 557.

[2] Bank of United States *vs.* Owens, 2 Peters, 527.

usury.[1] And in a sale of land, if the lender takes more than legal interest for the forbearance of the debt, it is usury.[2] When a bank discounts a note with depreciated paper it is usury.[3]

A fair rate of exchange on foreign bills, according to current rates, may be received, but if more was intended to be taken, it is usury. And if a charge for exchange is a cover for usury, the contract is void.[4]

It is not usury in a bank having the power by its charter to deal in exchange, to charge the market rate of exchange upon time bills.[5]

The court says: "The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is, that the former is a just and lawful compensation for receiving payment at a place where money is expected to be less valuable than at the place where it is advanced and lent. * * * The contract is not unlawful, unless more than six per cent. has been reserved or taken for interest; if more has been reserved or taken, not for the loan and forbearance, but for a change in the place of payment, then the contract is lawful." In the case under consideration, the money was in Milwaukee, where it was advanced, and where the plaintiff agreed to receive it in the same funds, as to their par value, that he advanced, with the highest rate of interest, and one per cent. added.

The note is not payable in Boston with exchange, but in Milwaukee.

In *Stevens vs. Lincoln*, 7 Metcalf, 525, which was an action to recover usurious interest paid, it was conceded that a note made in the State of Massachusetts, and payable in the same state, with interest and exchange, was usurious. The exchange was considered a cover for usurious interest. The maker of

[1] Lloyd *vs.* Scott, 4 Peters, 205.

[2] Hogg *vs.* Ruffner, 1 Black, 115.

[3] Gaither *vs.* the Farmers and Mechanics' Bank, 1 Peters, 37.

[4] Andrews *vs.* Pond, 13 Peters, 65, 80.

[5] Buckingham *vs.* McLeon, 13 Howard, 150.

two promissory notes, in order to obtain a renewal, gave a new note for the amount, paying the interest due and the discount, and in addition, he transferred to the holder, at par, drafts on New York and Albany, worth three-fourths of one per cent. premium, to an amount equal to the debt. Being a transaction within the State of New York, it was held to be usurious.[1] In *The Bank of the United States vs. Davis*, 2 Hill, 451, the same principle is recognized. The bank having discounted a bill of exchange on New York, charged exchange in addition to the amount allowed by law. In the case of *The Oliver Lee & Co.'s Bank vs. Walbridge*, 19 New York, 134, the note was made in the city of Buffalo, discounted at a bank of that city, and was made payable in the city of New York, with the purpose in the parties to enable the banker to realize a profit from a difference of exchange between Buffalo and New York; a majority of the court held that there was no usury in the contract, for the reason that the law recognized no difference in value in money within the state. But the evident inclination of the judges delivering opinions was, to consider the contract usurious in principle. The Supreme Court of the State of Indiana, in *The State Bank vs. Ensminger*, 7 Blackford, 105, and in *Mix vs. Madison Insurance Company*, 11 Indiana, 117, adjudged notes similar to the note in this suit, to be usurious. *Towslee vs. Durkee*, 12 Wisconsin, 480, establishes the principle in this state, that where the lender made a condition of a loan within the state, that exchange on New York should be paid in addition to lawful interest, the contract was usurious.

The law of the place of the contract forbade the receiving or contracting for a greater amount of interest than twelve per cent., directly or indirectly. If a larger amount of interest than twelve per cent. were expressly reserved, the contract may be pronounced usurious without further inquiry, as it is for the court to construe a written instrument, which exhibits an usurious contract.[2] It is equally the duty of the court so to

[1] Seneca County Bank *vs.* Schermerhorn, 1 Denio, 133.

[2] Bank of the United States *vs.* Waggoner, 9 Peters, 378; Levy *vs.* Gadsby, 3 Cranch, 180; Walker *vs.* The Bank of Washington, 3 Howard, 62.

construe a written instrument, which exhibits an unlawful intent to contract for usury indirectly. There is no proof, in explanation of the reason, for making the note payable with exchange. The note was thus drawn and signed. In the absence of proof on the subject, the mere fact of the payee's residence being near Boston will not relieve him of the imputation of indirectly contracting for a greater profit on the loan than the law allowed, and that his case comes fully within the prohibition of the statute. I think the note is usurious on its face, as a contract for a greater sum for the loan of money than twelve per cent. An usurious intent is inferable from the contract.

As the jury allowed interest in the verdict, a new trial will be granted, unless the plaintiff remits the excess over the principal of the note.

WOODWARD vs. THE ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY TERM, 1864.

LIABILITY OF COMMON CARRIER.

1. CARRIER HELD TO CERTAIN CARE, NOTWITHSTANDING EXEMPTION.—Under a contract exempting a carrier from liability in case of fire, he becomes an ordinary bailee, and is held only to that kind of care and diligence applicable to a bailee under the circumstances of the case. He is still held to due care and diligence as to the kind and quality of cars, the running and management of trains, the proper precautions against fire, etc., having reference to the season of the year, the character of the property, the country through which it was to be carried and the nature of the transit.

2. AGENTS MUST BE VIGILANT.—Though the property catches fire without the negligence of the carrier, if his agents do not make all proper and necessary efforts to save it, he is still responsible for all that might have been saved.

For any portion saved, the carrier is responsible, no matter what afterwards becomes of it.

3. MEASURE OF DAMAGES.—The measure of damages is the value of the property at the contracted destination, at the time when it should have arrived there, deducting freight. The jury may also allow additional damages by way of interest.

4. WHAT CONSTITUTES THROUGH BILL OF LADING.—A steamboat bill of lading for the shipment of goods at Memphis, to be delivered at Cairo, specifying the rate of freight through to Baltimore, and signed by the agents of the connecting railroad company, is a contract for through shipment, and the railroad company are entitled to the benefit of the exceptions contained in the bill of lading.

Action against the defendant as a common carrier, to recover the value of one hundred bales of cotton burned on the cars in transit.

The statement of the case will be found *ante p.* 403.

Gookins, Thomas & Roberts, for plaintiffs.

McAllister, Jewitt & Jackson, for defendant.

DRUMMOND, J., charged the jury as follows:

Under the uncontroverted facts of the case, the true construction of the bill of lading is that it was a contract for the shipment of the cotton from Memphis to Baltimore, and that the rights of the parties are to be controlled by it. There is no evidence of any other or different contract at Cairo concerning the transit of the property.

By the terms of this contract, therefore, the defendant was not to be held responsible in the case of a loss by an accidental fire, if the defendant used due care in transporting the cotton.

When the defendant has shown that the cotton has been destroyed in whole or in part by fire, then he is *prima facie* relieved from responsibility for such destruction, and the shipper must show that the carrier has been guilty of negligence or of a want of due care in relation to it.

Where property is transported by a carrier, under a contract exempting him from liability in a case of fire, he in that respect becomes an ordinary bailee and is held only to that kind of care and diligence applicable to a bailee under the circumstances of the case.

Notwithstanding the clause of exemption in the contract, the defendant was required to use due care and diligence in transporting the cotton, as to the kind and quality of the cars, as to the running and management of the trains, as to the proper means of extinguishing fires caused by a spark from the engine or otherwise, and as to the train hands;—having reference to the season of the year, the character of the property, of the country through which it was to be carried, and the nature of the transit, viz: by railroad.

An illustration often given of the kind of care and diligence required, is that care and diligence which a prudent person, under similar circumstances, would exercise over his own property.

Did the defendant use such care in this case? It is to enable the jury to answer this question that the evidence on both sides has been principally directed. It is contended on the part of the plaintiffs, that there was a want of proper care in many, or all, of these respects, and particularly in running the train, under the circumstances in proof, from Prairie Green to Ashkum. It is insisted on the part of the defendant, that all due care was used in every respect.

Before you can determine as to one point,—the prudence of running the train then and there,—you must ascertain, if possible, what appeared on the face of the prairie and on the line of the road to those who had the management of the train. By what they saw, or by what they could have seen by the exercise of proper diligence, it is to be determined whether, or not, they acted prudently. The position of the plaintiffs is that there was a fire on the prairie, on the track, or so near as to indicate to the managers of the train great danger and risk in proceeding. The position of the defendant is, that there was no such fire on or near the track as to show a reasonable probability of danger, but that there was a smoldering fire, so slight as not to attract attention, which was wafted into a flame by the wind created by the motion of the train. What was the condition of the track and its immediate vicinity at the time? Was it prudent, under the circumstances, to run the train as it was run,—that is, did it seem prudent to those having the management of the train, they exercising due care and diligence; because you must bear in mind you are not to judge by the event, but by what appeared at the time.

If there was a want of due care and diligence on the part of the defendant in any respect, and thereby the cotton was destroyed, then the defendant should be held responsible for the loss, otherwise not.

If you shall find that the burning was not occasioned by the want of due care and diligence on the part of the defendant, then the next question is, did the agents of the defendant make all proper and necessary efforts to save the property, and was any of it destroyed in consequence of the want of such

efforts. If so, then the defendant ought to be held answerable for all that could have been so saved. But you will determine this by the actual circumstances surrounding them, and with the means and appliances at their command. It was not, of course, necessary that they should incur actual danger to their persons by fire, but only that they should do all in their power to preserve the property, having reference to the rapidity of the fire and the means at their disposal.

The only ground upon which the defendant can escape liability under its contract is by showing that the cotton was destroyed by fire; for whatever was not destroyed by fire, no matter who took it or what became of it, the defendant is answerable. In addition to what was taken by the persons who came to the train, there were two bales saved. For all this the defendant must be held accountable in any event, because, I think, it was incumbent on the defendant to show to whom the cotton saved belonged, if it did not belong to the plaintiffs. If there were two fires on the prairie, the want of diligence must have been in reference to that fire which destroyed the cotton.

Whether the jury shall find for the plaintiffs for the whole or a part of the loss, the measure of damages in either case will be the value of the cotton at Baltimore when it should have arrived there, but for the loss, deducting the freight; and the jury may, if they choose so to do, allow additional damages by way of interest.

Verdict for plaintiffs of $10,000.

As to measure of damages in loss, see Krohn *vs.* Oeches, 48 Barbour, 127; Adams Express Co. *vs.* McDonald, 1 Bush, 32; Rice *vs.* Ontario Steamboat Co., 56 Barbour, 384; Bazin *vs.* Steamship Company, 3 Wallace, Jr., 229.

That carriers may limit their liability, but not as against their own negligence, Seller *vs.* The Pacific, 1 Oregon, 409; The Brig May Queen, Newberry, 464; Beck *vs.* Evans, 16 East, 244; Birkett *vs.* Willan, 2 Barnewall & Alderson, 356; Brooke vs. Pickwick, 4 Bingham, 218; Parsons *vs.* Monteath, 13 Barbour, 353; Stoddard *vs.* Long Island R. R. Co., 5 Sandford, 180; Western Transportation Co. *vs.* Newhall, 24 Illinois, 466; Illinois Central R. R. Co. *vs.* Adams, 42 Illinois, 474; Goldey *vs.* Pennsylvania R. R.

Co., 30 Pennsylvania State, 242; Illinois Central R. R. Co. *vs.* Morrison, 19 Illinois, 136; Ashmore *vs.* Pennsylvania Steam Towing Trans. Co., 4 Dutcher, 180.

For a similar case of loss of cotton by fire, see Levering *vs.* Union Transportation, etc., Co., 42 Missouri, 88.

Common carrier, undertaking to deliver at a certain point, is liable, though the loss occur beyond its line. Barter *vs.* Wheeler, 49 New Hampshire, 9; Perkins *vs.* Portland R. R. Co., 47 Maine, 573; Peet *vs.* Chicago and Northwestern R. R. Co., 19 Wisconsin, 118; Morse *vs.* Brainerd, 41 Vermont, 550; Tuckerman *vs.* Stephens, etc., Trans. Co., 3 Vroom, 320; Mosher *vs.* Southern Express Co., 38 Georgia, 37; Southern Express Co. *vs.* Shea, Id., 519; The Nashau Lock Co. *vs.* Worcester, etc., R. R. Co., 48 New Hampshire, 339; Fatnam *vs.* Cincinnati, etc., R. R. Co., 2 Disney, 248; Schneider *vs.* Evans, 25 Wisconsin, 241. Receiving payment for the whole route is evidence of the undertaking and liability. Muschamp *vs.* The Lancaster & Preston Junction R. R. Co., 8 Meeson and Welsby, 421, which is the leading English case, and followed in Crouche *vs.* Great Western R. R. Co., 2 Hurlstone and Norman, 491, and 3 do., 183; St. John *vs.* Van Santvoord, 25 Wendell, 660 (Reversed in 6 Hill, 157); Wilcox *vs.* Parmelee, 3 Sandford, 610; Wilby *vs.* West Cornwall Railway Co., 2 Hurlstone and Norman, 703, 21 Law Reporter, 372; Noyes *vs.* R. & B. R. R. Co., 27 Vermont, 110; Kyle *vs.* The Laurens R. R. Co., 10 Richardson, Law, 382; Hart *vs.* Rensselaer & Saratoga R. R. Co., 8 New York, 37; Scotthorn *vs.* South Staffordshire R. R. Co., 8 Exchequer, 341; Wilson *vs.* York N. & B. R. R. Co., 18 English Law and Equity, 557; Webber *vs.* Great Western R. R. Co., 3 Hurlstone and Coltman, 771.

The Court of Appeals of New York, have lately laid down the important distinction, that where a common carrier under a special contract, limiting his common law liability, undertakes to carry to the terminus of his line, and there deliver to another carrier, he has no authority on behalf of the owner to contract with the second carrier limiting his liability; the full common law liability attaches to the latter at once. Babcock *vs.* Lake Shore and Michigan Southern Railroad Company, 49 New York, 491. Effect of receipting for goods marked to a point beyond terminus, Id.

A carrier receiving goods marked for a certain place, undertakes to deliver at that place, and is liable for a loss beyond his line. Illinois Central R. R. Co. *vs.* Johnson, 34 Illinois, 389; Angell *vs.* The Mississippi and Missouri R. R. Co., 9 Iowa, 489; Illinois Central R. R. Co. *vs.* Frankenberger, 54 Illinois, 88; Watson *vs.* The Ambergate N. & B. R. R. Co., 3 Law and Equity, 497; Coxon *vs.* The Great Western Railway, 5 Hurlstone and Norman, 274.

A railroad company selling tickets over its own and other roads is liable for the safety of baggage to the point of destination. Illinois Central R. R. Co. *vs.* Copelend, 24 Illinois, 332; *contra* Straiton *vs.* New York and N. H. R. R. Co., 2 E. D. Smith, 184; Wilcox *vs.* Parmelee, 3 Sandford, 610; Quimby *vs.* Vanderbilt, 17 New York, 315; Candee *vs.* The Pennsylvania R. R. Co., 21 Wisconsin, 582; Carey *vs.* The Cleveland and Toledo R. R. Co., 29 Barbour, 35. This is the English rule. Thomas *vs.* The Rymny Railway Co., 6

Law Reports Queen's Bench, 266; Great Western Railway Co. *vs.* Blake, 7 Hurlstone and Norman, 987; and in Toledo, Peoria, and Warsaw R. R. Co. *vs.* Merriman, 52 Illinois, 123, the carrier was held liable for a loss beyond his line on a through contract under the bill of lading, even though it limited the liability to loss on the line of the company. Nor does "privilege of re-shipping" affect his liability for safe delivery at destination. Little *vs.* Semple, 8 Missouri, 99.

Consult also Joeneson *vs.* Camden & Amboy R. R. Co., 4 American Law Register, 234; Rome R. R. Co. *vs.* Sullivan, 25 Georgia, 228; Brintnall *vs.* Saratoga & Whitehall R. R. Co., 32 Vermont, 665; Johnson *vs.* New York Central R. R. Co., 33 New York, 610.

But in N. R. R. Co. *vs.* Waterbury Button Co., 24 Connecticut, 468, it was held that a railroad company could not contract to carry beyond its own limits, and in Northern R. R. Co. *vs.* Fitchburg R. R. Co., 6 Allen, 254, the first company was considered as a forwarding agent. Also in Briggs *vs.* Boston, etc. R. R. Co., Id., 246, and in Connecticut and Massachusetts, the courts have refused to extend liability beyond the carrier's line. Hood *vs.* The New York and New Haven R. R. Co., 22 Connecticut, 1; Elmore *vs.* Naugatuck R. R., 23 Connecticut, 457; Converse *vs.* The Norwich and Worcester Trans. Co., 33 Connecticut, 166; Nutting *vs.* The Connecticut River R. R. Co., 1 Gray, 502; Darling *vs.* The Boston and Worcester R. R. Co., 11 Allen, 295; Gass *vs.* The New York, Providence and B. R. R. Co., 99 Massachusetts, 26; Burroughs *vs.* The Norwich and Worcester R. R. Co., 100 Massachusetts, 26; Hill Manufacturing Co. *vs.* Boston and Lowell R. R. Co., 104 Massachusetts, 122.

The tendency of the courts, however, and the weight of authority, as well as the better reason, seems to be to hold common carriers liable to the destination to which they profess to convey.—[*Reporter.*

BARRON vs. ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1864.

1. ACTION FOR DAMAGES UNDER STATUTE.—Under the Illinois statute of February 12, 1853, an action can be maintained for the benefit of the next of kin, even though they may have had no legal claim on the deceased for support. It is not necessary to prove actual pecuniary loss.

2. WHEN NEXT OF KIN MAY SUE.—If the injured party would have had, by the common law, a right to sue if he had lived, then, if he dies, his representatives can maintain an action. The statute did not intend to give them a right of action in one section, and in the second render that right nugatory by depriving them of all damages.

3. What circumstances the jury may consider.

4. RAILROAD COMPANY LIABLE FOR ALL TRAINS ON ITS TRACK.—If a railroad company allows the trains of another company to run over its track, as to passengers on its own trains it is responsible in the same manner as if all the trains belonged to itself.

This was an action under the statute of February 12, 1853, brought by William T. Barron, executor, to recover damages for the death of William Barron, who was killed on the 8th of January, 1862, between Hyde Park and Chicago, while a passenger on the cars of the Illinois Central Railroad.

The statute reads as follows:[1]

"§ 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company, or corporation, which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and al-

[1] Gross' Statutes, 1871, p. 60.

though the death shall have been caused under such circumstances as amount in law to felony."

"§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of $5000; *provided*, that every such action shall be commenced within two years after the death of such person."

Clark, Cornell & Norton, for plaintiff.

McAllister, Jewitt & Jackson, for defendant.

DAVIS, J., charged the jury as follows:

By the common law this action could not be sustained.

In 1853 a statute was passed in this state giving a right of action wherever death is caused by the act of a person or corporation, where if death had not ensued the party injured would have been entitled to sue. The act also provides, that the action shall be brought by the personal representatives of the deceased, and the amount recovered shall be for the exclusive benefit of the widow and the next of kin, and that the jury may give such damages as they shall deem a just and fair compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin, not exceeding the sum of $5,000.

Barron was never married, and it is contended by the defendant, that the next of kin being his father, brothers and sisters, had no claim on him for support or services, and therefore there could have been no pecuniary loss to them by his death.

We cannot adopt this construction of the law, but charge you that there can be a recovery if the deceased left no kin surviving him, who had any legal claim on him, if living, for support. The cause of action is given in the first section of the act in clear and unmistakable terms. If the injured party, by the common law, had a right to sue if he had lived, then, if he dies, his representatives can bring an action. Many individuals who lose their lives by the fault of persons and corporations, are of age, unmarried, and have no next of kin dependent on them for support. We cannot suppose that the statute intended to give the representatives of such persons the right to sue in one section, and make that right nugatory in the second section, by depriving them of all damages. The policy of the law was evidently to make common carriers more circumspect in regard to the lives entrusted to their care. They were responsible at common law, if through their fault, broken limbs were the result, but escaped responsibility if death ensued. To remedy this evil, and provide a continuing responsibility, was, in the opinion of the court, the object of the law. We do not think it requisite to prove present actual pecuniary loss. It can rarely be done. The attempt to do it would substitute the opinions of witnesses for the conclusions of the jury. The facts proved will enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed. The jury are not to take into consideration the pain suffered by the deceased, nor the wounded feelings of surviving relatives, and no damages are to be given by way of punishment. In this case the next of kin are the parties who were interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them.

The jury have a right, in estimating the amount of pecuniary injury, to take into consideration all the circumstances attending the death of Barron, the relations between him and

his next of kin, the amount of his property, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age, with the business and means which he had. There is a possibility in the chances of business that Barron's estate might have decreased rather than increased, and this possibility the jury may consider. The jury also have a right to take into consideration the contingency that he might have married, and his property descended in another channel. And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation for the pecuniary loss which the widow, if any, or the next of kin might sustain by the death of the party, and the jury are to determine, as men of experience and observation, from the proof what that loss is. In order to render a verdict for the plaintiff, it is necessary that the defendant should have been in fault.

The Illinois Central Railroad Company engaged to carry Judge Barron safely from Hyde Park to Chicago, and, as a common carrier, was bound to the most exact care and diligence required for the safety of passengers. The facts in the case are few and uncontradicted. On the morning of the 8th of January, 1862, Judge Barron was a passenger from Hyde Park to Chicago. The train was from seven to ten minutes behind time, and the track was slippery. By contract between the Michigan Central and Illinois Central companies, the cars of the former were permitted to use the track of the latter, as far as Calumet. Proper time tables were arranged. The Cincinnati Express of the Michigan Central, by these time tables, should have passed Hyde Park at least thirty minutes in advance of the train of the Illinois Central Railroad. On the morning of the 8th of January, the Cincinnati Express train was behind time, and collided with the Illinois Central train at Kenwood, which was the immediate cause of the disaster. It is argued that the Cincinnati train caused the death of Barron, and that therefore the Illinois Central is not liable. The jury may believe, from the evidence, that the

Cincinnati train was chiefly in fault, and that without its agency the calamity would not have happened; yet if they also believe from the evidence, that the misconduct or negligence of those in charge of the Illinois Central train contributed to the disaster, then the defendant was in fault, and the plaintiff is entitled to recover.

It is not a question which train was mostly in fault, but whether the train of the defendant was in fault at all. It is for the jury to say, from the evidence, whether the employes of the Illinois Central Road used the necessary degree of care and diligence in the management of their train on that morning. Their train was behind time; the track was slippery, and it was known to them that an express train was liable to come up at any minute. Should they not have indicated by flagging, or in some other way, that they were using the road? Can the jury say that if this had been done this accident would have occurred? If the proper degree of diligence did not require flagging, and if being out of time did not contribute to the accident, then the Illinois Central train was not in fault. And the court would further instruct you, gentlemen, that if you shall find that the death was caused by the joint fault of those who had the management of the Michigan Central and the Illinois Central trains, then the defendant is liable in this action; or if you shall believe from the evidence, that the Michigan Central train was running on the road of the defendant by virtue of a contract with it, and that the train was under the sole management of the agents of the Michigan Central Road, and that the death was caused entirely by their fault, then, under the conceded facts of this case, the defendant would still be responsible. We understand that the road on which the accident occurred belonged to the defendant, and, by its charter, was under its sole control to carry passengers and property; and if it allowed the trains of the Michigan Central to run over it under the management of the agents of the Michigan Central, it should be done in such a manner as not to interfere with the safety of the passengers of the defendant, and as to such passengers, the fault of the Michigan

Central Road in running their train is the fault of the defendant.

Verdict and judgment for the plaintiff for $3,750 damages.

This decision was affirmed by the Supreme Court, 5 Wallace, 90.

Consult also opinion on demurrer, *ante p.* 412.

A railroad company allowing another to run cars over its road is liable for injuries done. Colegrove *vs.* New York and Harlem R. R. Co., 6 Duer, 382.

A railroad company is liable for an injury occasioned by negligence of its agents in management of a train under their control, though belonging to another company. Fletcher *vs.* Boston, etc. R. R. Co., 1 Allen, 9.—[*Reporter.*

WINSLOW vs. FOUR HUNDRED BARRELS OF SALT.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST 1864.

IN ADMIRALTY.

WAIVER OF LIEN FOR DEMURRAGE.

1. If a master delivers a cargo, and receives the freight, without an agreement on the part of the person receiving it that it is to be held subject to a lien for demurrage, the lien is waived, and a libel for demurrage cannot be sustained against the cargo.

2. The fact that the master stated that he should look to the cargo for the claim for demurrage, is not sufficient to sustain the lien.

Appeal from decree of District Court, dismissing the libel, which was filed to recover demurrage for delay in loading and unloading a cargo of salt.

Robert Rae for libellant.

Waite & Towne for respondent.

DAVIS, J.—The bark Major Anderson, owned by the libellant, was employed to bring a load of salt from the port of Bay City, Michigan, to the port of Chicago. The vessel was unnecessarily detained at Bay City for three days, for which demurrage is claimed. Demurrage is also claimed because the vessel was not unloaded with dispatch at Chicago.

The question for determination is whether, if demurrage was due, the lien for it on the four hundred barrels of salt has not been waived. I think it has. The cargo of the vessel was salt, and consigned to H. Gelpcke, at Chicago. The master, on his arrival here, reported to Gelpcke, the consignee, who referred him to Haskin, who had bought from Gelpcke a large quantity of salt, to be delivered. Haskin, accordingly, received

the cargo in place of Gelpcke, which was discharged after an unusual delay. Ingraham, the captain, and Egan, the agent of the Anderson, told Haskin that they would look to the salt for their claim for demurrage; but Haskin never ageed that he would receive the salt subject to this claim. The salt was delivered and freight paid, and, if there was a just claim for demurrage, why was not some understanding had between Haskin and the agent of the vessel, that the lien on the salt would be retained for the demurrage? If Egan, on delivery, had insisted on this, and Haskin had assented to it, then the lien would exist. A mere intention, on the part of the agent of this vessel, that he would retain the lien, and saying so, does not constitute the lien. Egan could have refused to deliver the salt, if the vessel's claim for demurrage was right; but instead of that, he does deliver, on payment of freight only, and doubtless misled Haskin by leading him to believe that the vessel would look to Gelpcke, and, in fact, negotiation is afterward had by Egan with Gelpcke, which proving abortive, the salt was attached, and this libel filed. The delivery of the salt was unconditional. Haskin treated it as his own, without incumbrance and with no understanding that the lien should continue, and in fact sold part of this very lot now in controversy.

In the opinion of the court, the lien on the salt was waived when it was delivered to Haskin, who received it without consenting to hold it subject to the lien for demurrage.

Judgment below is affirmed.

Contra, see One Hundred and Fifty-one Tons of Coal, 4 Blatchford, 368.

For an extended discussion of the doctrine of maritime liens, and numerous references to authorities, see 5 American Law Register (O. S.,) 128. Angell on the Law of Carriers, § 370 *et seq.*—[*Reporter.*

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY vs. PAGE, Assessor, &c.

Circuit Court.—Northern District of Illinois.—August, 1864.

In Equity.

1. New Certificates of Stock—When not Dividends.—Where a railroad company, from time to time, made advances from their surplus earnings to another railroad company, taking leases and mortgages therefor, and such second company finally became insolvent, and the loaning company, to secure their debt, foreclosed their mortgages and purchased the insolvent road for the amount of their advances, and issued stock certificates to each of their stockholders, representing their *pro rata* interest in this property thus acquired—all the said advances having been made prior to the passage of the act of July 1, 1862—such certificates are not dividends within the meaning of section 81 of that act, and are not subject to the three per cent. tax.

2. The advances having all been made prior to the passage of the act, and no money having been received at the sale, but the company having simply perfected their title and enforced a pre-existing lien, and having always treated this acquired property as added capital stock, such certificates are not properly dividends in money or scrip paid to the stockholders.

This was a bill to prevent the collection, by seizure, distress, or otherwise, by Mr. Schneider, the United States collector for this district, of a tax for $29.285, claimed to be due to the United States from the complainant, under the 81st section of the Internal Revenue law of July 1, 1862.[1] A controversy having arisen between the Government and the railway company as to the right of the former to assess and levy the tax, and the collector being ordered to enforce its collection, this bill was filed.

By various acts of the Legislature of Illinois, the complainant, prior to 1860, had the right to construct a railway from Junction, in the county of DuPage, to Galesburg, in the county of Knox. The road was in operation between those points in

[1] 12 U. S. Statutes at Large, 469.

1855. For the purpose of aiding the Peoria and Oquawka Railway Company, and to obtain for itself a connection with the Mississippi river at Burlington, the complainant, in 1854, advanced to the Peoria and Oquawka Railroad a sum exceeding three hundred thousand dollars, which was secured by a lease in the nature of a mortgage on that part of the Peoria and Oquawka Railroad west of Galesburg. This sum was not sufficient for the purpose contemplated, and, prior to the first day of January, 1862, the complainant, with the same object, had advanced other large sums of money to that company, amounting, in the aggregate, even as early as the first of January, 1860, to more than fifteen hundred thousand dollars. This whole indebtedness was secured by mortgages, leases, and contracts in the nature of mortgages on that part of the Peoria and Oquawka Railroad extending from Peoria to Burlington. The plaintiff was also obliged to purchase, in order to secure these advances, certain first and second mortgage bonds of the Peoria and Oquawka Railroad, amounting to twelve hundred and fifty thousand dollars, given and secured in 1852 and 1853, on the same part of the road. Prior to the first day of January, 1862, the complainant had become the owner of nearly all of these mortgage bonds.

In February, 1860, the Peoria and Oquawka Railroad Company had become insolvent, and the complainant caused suit to be instituted to foreclose these mortgages in this court, and a decree of foreclosure was entered, and at the sale under the decree, which took place in October, 1862, the complainant became the purchaser of that part of the road between Peoria and Burlington, as the only means of saving any portion of the moneys previously advanced.

From July, 1857, to November, 1862, but one dividend was distributed to the stockholders by the complainant. The earnings of the complainant's road were appropriated to aid in making the advances and purchases already referred to, and which have never been reimbursed, except by the sale of the part of the Peoria and Oquawka Railroad above mentioned, and of which the complainant is now the owner.

In November, 1862, the complainant had on hand of the earnings of its road, $210,207.29, which had not been appropriated in the manner stated above, and which sum it divided among its stockholders, reserving three per cent. therefrom, which was paid to Mr. Schneider, the Collector for the United States, as required by the 81st section of the Internal Revenue law. The complainant, with a view of ascertaining the amount of the earnings of the road, which had thus been advanced to the Peoria and Oquawka Railroad Company, on the 16th of November, 1862, caused an account to be taken, and the sum was found to be in the aggregate $946,900, and thereupon a stock certificate was issued to each of the stockholders of the complainant's road, showing the *pro rata* amount of earnings which had been advanced, the same amounting to about twenty per cent. to each stockholder on the original amount of stock held by each. The certificate which was issued under this arrangement was to the effect that the holder was entitled to so many shares of the full paid stock of the company—thus turning the property which had been acquired for the advances made, into capital stock of the company. It was three per cent. of the sum thus advanced and for which certificates were given in November, 1862, that the Government claimed should be paid by the railway company.

Walker & Dexter, for complainant.

Perkins Bass, U. S. District Attorney, for defendant.

Drummond, J.—The 81st section of the act of July 1, 1862, provides that on and after that day "all dividends in scrip, or money, or sums of money thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits or gains of said companies, shall be subject to and pay a duty of three per centum on the amount of all such * * * dividends whenever the same shall be paid; and said railroad companies or railroad corporations, or any person, or persons owning, possessing or having the care or management of any

railroad company, or railroad corporation, are hereby authorized and required to deduct and withold from all payments made to any person, persons or party, after the first day of July, as aforesaid, on account of any * * * dividends due and payable as aforesaid, the said duty or sum of three per centum."[1]

In conformity with the joint resolution of July 17, 1862, the Secretary of the Treasury gave notice that the time mentioned in the foregoing section should be construed as referring to the first day of September, 1862.

It is insisted on the part of the Government that the issuing of the certificates of stock in November, 1862, was a division among its stockholders of the profits and earnings of the road, or a dividend in scrip within the meaning of the law.

There can be no doubt the assets, securities and mortgages held and owned by the plaintiff at the time of the passage of the law, and which were then in course of foreclosure and sale in this court, were partly acquired with the earnings and profits of the road; but they were laid out and invested in them—a large share prior to 1860, and all prior to July 1, 1862. These profits and earnings had then actually been disbursed for them and they were held as part of the general property or assets of the company. When the company enforced its lien by a sale, the property and assets, in part purchased with the earnings of the road, did not produce the money which had been paid for them, but the company took in their place that part of the Peoria and Oquawka Railroad extending from Peoria to Burlington, and became the legal and equitable owner of the same. Its value as an acquisition to the property of the plaintiff was estimated at its cost, and a stock certificate was issued, showing the amount which each stockholder had contributed towards the purchase.

We think in no just sense can this be considered as a dividend. It was not intended or treated as such by the company. It is true that it is not necessary the division should be of money, but the act clearly contemplates that when it is in scrip, it shall be of a character to be paid,—and the payment of which can be deducted and withheld from the stockholders

[1] 12 U. S. Statutes at Large, 469–70.

by the managers of the railroad,—and that it shall be due and payable. Apply these tests to this property and it will be seen the facts will not warrant the right claimed. Before the sale, it could be regarded only as a loan or purchase made; after, as a *bona fide* title acquired in the property by the company,—consequently by all the stockholders,—and not as something due and payable to them. If heretofore it had been converted into money, or hereafter it ever shall be, and the amount divided among the stockholders, there might be now, or then, some apparent reason for the position taken. And if the company had had on hand at the time of the passage of the law a portion of its earnings, and afterwards purchased with them property which it converted into stock, there would be some force in urging that the company could not in that way avoid the payment of the tax to the Government. But the argument here is, that it is of no consequence what the actual value of the property was in November, 1862, or at the time of the advances,—though not one quarter of the money paid,—yet it must be regarded as a dividend for the whole, and it goes even further, and seeks to establish either that the property must be sold in whole or part to pay the tax, or that earnings on hand and not divided, or subsequently acquired, and for which, therefore, there might be a tax due, shall have an additional burden to the three per centum already imposed. It is plain that such a principle would reach every purchase made with its profits by a railway company in past years, either of real or personal property, added to the general stock, and any apportionment of stock so acquired, for which a certificate might be given after September 1, 1862, showing the amount of such purchase or apportionment, and the share of the stockholder in the same. A construction which leads to such consequences ought not to be given to this statute unless the language imperatively demands it. There is nothing in the scope or spirit of the law, or in its terms, to require such a construction. The true question must always be in these cases: Has there been a *bona fide* dividend in money or scrip paid to the stockholders, or has there been an attempt to cover up or conceal the

payment of a dividend by some device or mere form. If there has been, it may be conceded that the tax should be paid.

If in 1860 a man had bought an estate, or a mortgage on one, with a portion of his income for that year, he thereby added to his estate the value of the purchase. If he in that way increased his income for 1862, that would be taken into account in assessing it, but if he were then to forclose the mortgage or perfect his title, that would only be consummating a right of property by enforcing an absolute lien. If he made sale of the property, would the proceeds become part of his income for that year, even though re-invested in another estate?

It is contended on the part of the plaintiff that the law only refers to the earnings received after its passage, July 1, 1862. There is much force in the argument, particularly upon comparing the eightieth with the eighty-first section, the former of which declares that, on and after a certain day, railroad managers shall be subject to, and pay a duty of three per centum on the gross amount of all receipts for the transportation of passengers; but it is not necessary for us to decide that question. We think, however, that there must be, in substance or in fact, after the 1st of September, 1862, a distribution of a dividend in money or scrip, made to the stockholders, and not the mere evidence given of a title in property, the right to which already existed.

But it may be said that when there are earnings to be divided, the right to them exists before the division. That is true, but it is also true that until actually divided, the managers of the railroad have control of them, and may appropriate them to the improvement or repairs of the road. It is the setting them apart as a dividend in money or scrip that makes the law operate upon them so as to authorize the tax of three per cent.

We think, therefore, under the circumstances of this case, these certificates of stock cannot be regarded as a dividend declared due and payable to the stockholders in November, 1862. The company and the stockholders treated that part of the property acquired with these earnings as capital stock, and it

cannot be at the same time stock added to the capital and a dividend.

At the argument, objection was made by the counsel of the Government, though not pressed, that the court ought not to interfere in this summary manner to prevent the collection of the revenue, and various authorities were cited upon that point. We have not fully considered that question, and any temporary order that may be made will be regarded as leaving that open for future consideration. This, we understand, is the wish of the counsel, while at the same time desiring the opinion of the court on the merits of the case. The plaintiff insists that a suit at law would be unavailing in consequence of the pecuniary irresponsibility of the collector, and because his sureties would not be liable, and therefore if this bill is not maintainable the plaintiff is without remedy.

We are informed that the judges of the Circuit Court of the United States for the Eastern District of Michigan, at the June term of the present year, have decided that the sureties of the collector were not liable for illegal collections. If this be so, and the collector himself is not able to respond in damages in an action at law, there would seem to be some ground for the application in this case. However this may be, or whether the distinction taken in some of the cases is sound, that courts of equity will interfere when the tax is illegal or the property not subject to the tax,[1] and not in other cases, we need not now inquire.

The question in this case has been examined because of the desire expressed by the counsel to that effect, on both sides.

If necessary, the right of the court permanently to interfere and arrest the collection of this tax may be hereafter considered.

It is proper to add that Judge Davis, to whom it has been submitted, entirely concurs in this opinion.

[1] Chicago, Burlington & Quincy Railroad Company *vs.* Frary, 22 Illinois 34.

SAYLES vs. CHICAGO AND NORTHWESTERN RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY 1865.

IN EQUITY.

1. DELAY IN PATENT OFFICE.—A patentee cannot be held accountable for the delays in the Patent Office, the law, by its terms, providing for the perfection of imperfect and insufficient specifications, even after the patent issues.

2. The law looks with indulgence upon the delays which arise from the circumstances of parties who make an invention, and it is only when the invention is intentionally abandoned or neglected, or the parties show, by their acts, that they have not done all they can do, that the law declares that they shall not be protected.

3. DOCTRINE OF EQUIVALENTS—should be critically scanned where there may be a difference in relation to two machines, which, in some respects, operate by equivalent devices, and in other respects do not, to ascertain whether one has become a practical machine, while the other is not.

4. CONTINUED USE NOT NECESSARY.—When an improvement or a machine has been once made and used, it is not necessary that it should be used up to the time that another person may make a similar improvement. If it has been once used, and is a practical improvement or machine, no one else can claim to be the inventor.

This was a bill in equity, filed to restrain the defendant from infringing letters patent for "improvement in railroad car brakes," granted to Henry Tanner, assignee of Lafayette F. Thompson and Asahel G. Bachelder, July 6, 1852.

The invention consisted in the employment of a lever pivoted in the center under the middle of a car body, the outer ends of which were connected by rods to windlasses at each end of the car, while the brakes were attached on opposite sides by rods to points in the same lever, intermediate between the ends and the pivot. In this way, by operating the windlass at either end, the brakes of both trucks were simultaneously applied.

The claim is quoted in full in the opinion of the court.

The brake used by the defendant was the one known as the Stevens Patent Brake.

S. A. Goodwin & C. M. Keller, for complainant.

Blodgett & Winston and *Grant Goodrich*, for defendant.

DRUMMOND, J.—The letters patent in this case were granted to Henry Tanner on the 6th day of July, 1852, covering what is called the Double Acting Car Brake. It is well known that cars were originally run with four wheels, a single car brake being usually applied to them to retard or arrest the progress of the train. It became very important, when the railroad companies began to run cars with eight wheels, to have the brakes applied in such a way as to save the employment of numerous brakemen, and operate simultaneously upon all the wheels of the car, and that this should be done by an application of force at either end of the car, so that one man could act as brakeman upon two cars, instead of having three or more. It is this object which, it is alleged, was accomplished in this instance by pressing the brakes on all the eight wheels of the car simultaneously by the application of a force at either end, by means of a windlass there placed.

Although the patent was issued to Tanner, he was not himself the inventor, but this claim was set up by Bachelder & Thompson, Tanner being merely their assignee. The claim, as set forth in the specification, is this: "What is claimed by us is to so combine the brakes of the two trucks with the operative windlass or their equivalents, at both ends of the cars by means of the vibrating lever A, or its equivalent or mechanism essentially, as specified, as to enable the brakeman, by operating either of the windlasses, to simultaneously apply the brakes of both trucks, or bring or force them against their respective wheels, and whether he be at the forward or rear end of the car."

The case has been argued on the part of the defendant chiefly, I may say solely, on the ground that these parties,

Bachelder & Thompson, were not the original inventors of this improvement upon car brakes. It is also said that if the invention was ever made by them it was abandoned; that it was not prosecuted with that diligence which the patent laws required. For the purpose of showing want of novelty on the part of Bachelder & Thompson, the defendant relies mainly on two, or, I may say, on one improvement in car brakes called Millholland's improvement, which was, it is conceded, prior in point of time to that of Bachelder & Thompson. Some stress is also laid upon an improvement Mr. Nichols adopted in Connecticut, which, it is alleged, contained in several particulars the same principle as that of Bachelder & Thompson, and was used prior to the invention made by them. It becomes necessary therefore to ascertain when this improvement was first made by Bachelder & Thompson, and whether or not they abandoned it. The evidence in the case shows this to be the state of facts in relation to that matter; that Bachelder & Thompson, in the fall of 1846, substantially invented this method of applying the force to the car brakes, and that in June, 1847, they filed their application, with their model, and what purported to be specifications, in the Patent Office. They were not at all familiar with the method of obtaining a patent or with the law upon the subject, and they applied to a third party to assist them. The specifications which were filed, or what purported to be such, in the office were drawn up in a loose and very imperfect manner. The office itself was then overwhelmed with business, and applications were not taken up until long after they were filed. They, from time to time, called upon the gentleman whom they had requested to assist them, and letters were written to the Patent Office upon the subject, and in 1851, the application being still pending, in reply to some letters that were written, the agent of Bachelder & Thompson was told that the drawings and specifications as set forth were insufficient, and the further prosecution of an application for a patent in the case discouraged. However, upon a renewed effort on the part of Bachelder & Thompson, the officers in the Patent Office re-considered the subject, the

specifications were rendered sufficient as was supposed, and a patent was finally issued. It thus appears that for several years, from 1847 to 1852, this matter was thus suspended in the Patent Office. The first question that occurs is, whether these parties had neglected or abandoned their improvement in such a way as to make it public property,—and I think they had not. The whole testimony shows that they had not abandoned what they considered to be an improvement to which they had a right under the law. Certainly they cannot be held accountable for the delays in the Patent Office, and the law by its terms provides for the perfection of imperfect and insufficient specifications even after the patent issues. A question connected with this, is whether, when the application was made in June, 1847, there was substantially the improvement, the right to which was sought to be given to them by the letters patent in 1852;—and I think there was. It is true there was a change in the specifications as perfected and as originally filed, more having been claimed in the original specifications. Still, I think it is clear that they claimed in their original specifications substantially the method of combining the brake in the manner in which they set the claim forth in the last specifications upon which the patent issued. Besides, the patent law looks with indulgence upon the delays which arise from the circumstances of parties who may make an invention, and it is only when the invention is intentionally abandoned or neglected, or the parties show by their acts that they have not done all they can do, that the law declares that they shall not be protected in their invention. Therefore I find that this invention was made in the fall of 1846, claimed by application in the Patent Office in June, 1847, and protected in law by the issuing of letters patent in 1852. Then, were they the first inventors of this improvement in car brakes? I leave out of view all that is said in the testimony of what is called the Springfield brake. No particular stress is laid upon it in the argument of the defendant. It is not claimed or set up, I believe, in the answer.

The first question is in relation to what is termed the

Nichols Brake. I do not propose to dwell at any great length upon the testimony as to the time when this brake was used. Mrs. Nichols, the wife of Mr. Nichols, (Mr. N. having died in 1850,) states in her deposition that her husband made a drawing of it in the spring of 1846. If so, of course the invention would be prior to that of Bachelder, & Thompson theirs not having been made until the fall of that year. But I think that the weight of the evidence is that the Nichols brake, was not invented until the spring of 1847, and was not applied until 1848. We have constantly to bear in mind in weighing the testimony of witnesses who speak of circumstances occurring many years ago, the liability to mistake the particular year unless they have some evidence of a documentary character or otherwise, or some leading fact, as to which there can be no error, upon which they may rely to show the particular time.

This brake was applied upon what is termed a long baggage car. The witnesses Stockbridge and Fields state that this car was not finished until the spring of 1848. Various other witnesses differ as to the time, from Mrs. Nichols, and she differs now herself in giving her deposition from what she stated when she gave her testimony in the railroad case, tried in New York, some years ago. Besides she took an account book to Fields and inquired of him as to the time her husband put on the brake, which shows that she really had no memory as to the time. Taking all the testimony together in relation to this Nichols Brake, it is clear, the weight of it is, that this invention was not made by him prior to that of Bachelder & Thompson, even conceding that the two brakes are identical, as to which I give no opinion.

The principal difficulty I have had in the case is in relation to the Millholland brake. One of the defendant's counsel has presented an argument in which he insists with much force and plausibility, that the Millholland brake contains substantially the same principle as the Bachelder & Thompson brake, and that it was carried into practical effect by its use upon the cars.

We have, if I might be permitted to go out of the proofs in this case, a striking illustration of the uncertainty of human memory as to the time when this Millholland brake was first applied. When this brake first came before the court it was insisted, and apparently proved, I believe, that the Millholland brake was invented and used in 1842. Mr. Millholland says now in his deposition that he made and used it in 1843. But when we come to apply documentary evidence to the facts which are before us, I think it appears satisfactory that the Millholland brake was not used until 1845. But still if it were then used, and if it was a practical improvement, and similar in principle to that of Bachelder & Thompson, of course it prevents the patent of Tanner from operating. There is no doubt of this, that Millholland did invent a brake which operated in certain circumstances upon the two trucks by means of what is called a drum under the car, so that by the application of force at either end of the car, the wheels —all the eight wheels—were retarded. The main questions are, whether it was a practical and successful improvement, and whether it was abandoned as a mere experiment. There never was any patent applied for or issued. It is conceded and the proof clearly shows that it was never actual applied in any instance except upon one car, and I think it is clear that it was thrown aside and abandoned by Millholland himself in 1845. And if it was not introduced until 1845, then instead of being used for eighteen months it was only used for a few months. The car upon which it was applied was used very seldom. It is also certain it did not operate satisfactorily, and the brakemen complained that when used on the car, the windlass chains would break, or the car was liable to be thrown off. The Millholland brake was, in some respects, different from the Tanner brake. In the first place it operated by means of a drum upon which turned the chains to which the levers upon the brakes were attached. The brake of Bachelder & Thompson operated by means of a horizontal vibrating lever. The brake levers are also differently arranged. In the case of Millholland's brake the drum was rigid, the brake

levers being pivoted in such a way that they did not operate with any degree of elasticity or self adjustability. In this respect it would seem as though the two brakes were different, but perhaps the "horizontal lever" of Bachelder & Thompson's brake may be said to be equivalent to the drum of Millholland's brake. But I think the doctrine of equivalents should be critically scanned where there may be a difference in relation to two machines which in some respects operate by equivalent devices, and in other respects do not, to ascertain whether the one has become a practical machine and the other not. For instance, in relation to the drum, the result shows that there were defects in the Millholland brake which prevented it from becoming a practical, useful brake. It was used and abandoned. The reason for that is given by a witness who says that it was in consequence of the rigidity of these various levers, or what might be called levers; that if there was any defect in the shoes in any way, so that on applying force to the windlass at either end, the power would be applid to but one of the shoes, the strain would tend to break the windlass chains, before there was sufficient pressure of the shoes upon the wheels. One of the great objects sought by Bachelder & Thompson in their improvement, was this: whether the whels were running upon straight or curved lines, the shoes would all press simultaneously upon the wheels whenever force was applied, and by the elasticity of these various levers a defect in one of the shoes, would not prevent the contact of the others. Now I think these circumstances have great weight when we come to determine the question whether there was here an actual practical improvement in the car brake which would prevent any one else from adopting a principle that might be in that brake, and thereby perfecting the device.

I have come to the conclusion that there was not in this Millholland brake that kind of practical operating brake which would prevent any one else from obtaining a patent for a brake which would accomplish the object, which, it is clear, Millholland had in his mind, but does not seem to have carried out into practical operation by the brake which he made and applied in 1845.

I admit fully the law, as contended for by the counsel for the defendant, that when an improvement or a machine has been once made and used, it is not necessary that it should be used up to the time that another person may make a similar improvement. If it has been once used, and is a practical improvement or machine, no one else can claim to be the inventor. But in this case I think there was not that practical improvement of the brake discovered and used by Millholland which would prevent these parties from obtaining a patent for a brake such as that which was finally set forth in their specifications. I would refer particularly to the testimony of the only expert introduced. It seems to me that he is a very clear-headed man, and his testimony sets forth with great distinctness the difference between the Millholland and Springfield brakes, and the brake of Tanner. And this difference which he refers to ought to have great weight when we come to consider whether, in point of fact, such a brake as Millholland used did really prevent any other person from obtaining a patent for a double acting brake similar, in some respects, but which would successfully arrest the progress of railroad trains. The conclusion to which I have come is that Bachelder & Thompson were the inventors of this improvement, for which letters patent were issued to Tanner; that they never abandoned it from its discovery in the fall of 1846, and that there has been nothing shown in the evidence, which, fairly considered, would deprive them or their assignee of the right to it.

No question has been made in relation to the infringement. It is denied in the answer, but it is not insisted on or pressed in the argument. Of course in deciding this case I do not in any respect change the views which I announced on a former occasion, as to the distinction between the Stevens and the Tanner brake. The only claim which the plaintiff would have in this case would be for any damage which he may have sustained in consequence of defendant having used the invention of Bachelder & Thompson. But if the brake of Stevens, or of any other person, shall include the invention

of Bachelder & Thompson as a part of his brake, the plaintiff will not be prevented from claiming damages for the use of that part.

An interlocutory decree will be entered referring the case to a master, &c.

For further construction of these patents, consult Emigh *vs.* Chicago, Burlington & Quincy Railroad Company, Vol. 1 of this Series, p. 400.—[*Reporter.*

THE GRAY EAGLE.

District Court.—District of Wisconsin.—April, 1865.

In Admiralty.

1. Vessel having Lost her Lights—When Excusable for Running.—A sail vessel having lost her green and red lights in the night time, in a storm on Lake Michigan, may be excusable for pursuing her voyage, from necessity, during that night with the prohibited white light; but is in primary fault for running the next night down the Straits of Mackinac where there was good anchorage, without the signal red and green lights.

2. Held to Strictest Rules.—A sail vessel running with the prohibited white light alone, in the night time, is under superior obligations to observe the strictest duty to avoid collisions.

3. Lookout.—A sail vessel in an unseaworthy condition is in fault, when not having sufficient and competent lookouts, and an officer of nautical skill on deck.

4. Duty of Officers.—The master of a vessel running in the night without the proper signal lights, having seen a sail vessel four miles ahead, went below leaving a second mate in command, who was not skilled in seamanship, and no proper lookouts on deck, and when a collision became imminent, the second mate left his post and called up the master; *held*, these officers are in fault, and their evidence in regard to the collision is not reliable.

5. Approaching Sail Vessel.—A sail vessel in every respect seaworthy, meeting in the night time another sail vessel running on a calm water without the red and green signal lights, and with a white light alone, is justified in considering the white light to be the light of a vessel at anchor; and, in the absence of willfulness or gross negligence, is not in fault of a collision.

6. Vessel Disregarding Positive Rules.—A sail vessel running in the night time in disregard of the positive rules as to signal lights, is guilty of a

violation of law, and if she caused thereby uncertainty and embarrassment with the men on the colliding vessel as to her motion and course, the colliding vessel should not be adjudged in fault for a mistake in endeavoring to avoid an impending peril.

This was a libel brought by John Greening and Charles N. Deott, owners of the schooner Perseverance, which sailed from the port of Chicago for Ogdensburg, with a cargo of wheat on board, in the month of November, 1864. In a storm on Lake Michigan, she shipped a heavy sea, which washed away her screen, and broke both her colored signal lamps, leaving her with nothing but a white light. The master, being unable to procure signal lights at the Manitou Islands, and the weather being cold, proceeded on his voyage, and about two o'clock, A. M., of the 24th November, the schooner sailing down the straits of Mackinac, wind south, her course lying east of south, collided with the schooner Gray Eagle and was sunk.

The facts are further stated in the opinion.

Wm. P. Lynde, for libellant.

Emmons & VanDyke, for respondent.

MILLER, J. The second mate of the Perseverance, who had the watch that night, and was the commanding officer on deck, being on the lookout discerned lights ahead, and soon discovered that they were borne by a schooner, approaching the Perseverance in a west, south-west direction about half a mile distant, and bearing about one point on her starboard bow. In the 4th article of the libel it is propounded, that at the time when the light was first discovered the Perseverance carried a bright light suspended on her pawl post, which remained there until she went down. It is further alleged in the libel "that as soon as the second mate discovered the approach of the vessel, he called the captain of the Perseverance, who came immediately on deck. The approaching vessel hauled up so much that she shut out her red light, and the Perseverance kept on her course, the master and mate believing that the

approaching vessel would keep clear of her on the starboard side, until the vessels were nearly abreast, when the approaching vessel kept away again until she showed her red light, when the master of the Perseverance called to the approaching vessel to luff, and several times repeated this request in a loud and audible voice, and at the same time ordered his own man at the wheel to put the wheel down hard a-starboard. The approaching vessel made no reply, but kept on her course, and in less than two minutes the approaching vessel struck the Perseverance astern on about the starboard quarter with such force as to sink her in about two minutes, and was with her cargo totally lost."

The answer states that the schooner Gray Eagle was sailing up the straits of Mackinac, on a voyage from Buffalo to Milwaukee, that when about two miles to the southward and westward of Sheboygan light, which is about ten miles below the port of Mackinac, the Gray Eagle being in the usual course of vessels coming up the straits, and heading west-north-west, the wind being south-south-west. The first mate then had the watch, and was the commanding officer on deck. The schooner had two men on the lookout forward, and the commanding officer in his position, and a competent man at the wheel, and carrying a red light on her port bow and a green light on her starboard bow, as required by the regulations. A white light was seen about a mile distant bearing about a point on the Gray Eagle's port bow, which was supposed to be a light on shore, or upon a vessel at anchor. The Gray Eagle was then kept away about a point and steadied on her course to give berth to the light. The light was not discovered to be a vessel's light in motion, by the commanding officer, until the Perseverance got within about three lengths of the Gray Eagle. Said light was then nearly ahead, and to windward.

The answer further states that the mate not seeing any other light ordered the helm hard a-port, so as to pass on the port side and keep off, and clear the stern of the Perseverance; and that he then heard for the first time a cry from the other vessel to put the helm hard down, but it was too late, the vessels came

right together. That the Perseverance instead of passing the Gray Eagle on the port side as she should have done, without the knowledge of the commanding officer or the men of the Gray Eagle, and without lights to indicate her course, and contrary to prescribed or known rules of navigation, came right across the bows of the Gray Eagle, and was struck by the Gray Eagle on her starboard quarter, in the forward part of her cabin."

From the evidence, the Perseverance was under way in the night time, in the narrowest part of the Straits of Mackinac, and where there was good anchorage, without the signal green and red lights prescribed by the act of Congress, entitled "An act fixing certain rules and regulations for preventing collisions on the water," approved April 29, 1864,[1] and with the white light prohibited by said act.

Article 2 of rules concerning lights, is, "The lights mentioned in the following articles and no others shall be carried in all waters between sunset and sunrise."

Article 3 directs that steam vessels, when under way, shall carry at the foremast head a bright white light, with a green light on the starboard side, and a red light on the port side. The green lights and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

By article 5, sailing ships under way, or being towed, shall carry the same lights as steam ships under way, with the exception of the white light, which they shall never carry.

By article 7, ships, whether steam ships or sailing ships, when at anchor in roadsteads or fair ways, shall between sunset and sunrise exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, and at a distance of at least one mile.

These rules are so positive, that courts of admiralty will not

[1] 13 United States Statutes at Large. 51.

be justified in construing them otherwise than literally; and navigators must be required to strictly observe them.

The Perseverance having lost her green and red lights in a storm in the open lake in the night time, might be excused, upon the plea of necessity, in pursuing her voyage to the Manitou Islands, with a white light between sunset and sunrise; but there is no possible excuse for violating the positive rule the succeeding night in the Straits of Mackinac, where there was good anchorage.

Pressing necessity alone can excuse a vessel for violating this rule of navigation. The Perseverance was clearly the primary fault of the collision, by her running in the night time under a prohibited white light, and in the absence of the signal red and green lights.

The master of the Perseverance left the second mate on duty, and went below, where he remained warming himself and drying his clothes, he having on board an abundance of clothing. The lights of the Gray Eagle were observed ahead four or five miles off, which should have required the master to be on deck. And when within half a mile, the second mate, fearing danger, left his post and went below to call the master, who came on deck a very short time before the collision.

The theory of lookouts is so well established as not to require reference to authorities. The Perseverance had not sufficient and competent lookouts posted in proper positions on deck; neither did she observe the rule in respect to the officer's watch. A vessel on the lakes is more directly under the command of the master and first mate. The second mate, as in this case, is not usually employed or depended upon for his nautical skill.

The Perseverance was under way, descending the Straits of Mackinac at six miles an hour, without the required green and red lights, and carrying the prohibited white light. The master, under these circumstances, should have been on deck. Being wet and cold was no excuse for absence from his post. The master should have been strictly vigilant, but it seems he

was extremely negligent. For these reasons the Perseverance was in fault.[1]

It is contended that the Perseverance, not carrying the red and green lights prescribed by the rules, and sailing with the prohibited white light, must not be adjudged solely in fault, but that the colliding vessel, the Gray Eagle, is also in fault, as in the case of *Chamberlin vs. Ward*, 21 Howard, 548, decided under the act of March 3, 1849.[2]

That act did not prohibit the white light. I think the intention of the prohibition was to render the vessel guilty of its violation solely responsible for a collision, in the absence of willfulness or gross negligence on the part of the colliding vessel. Do the pleadings and proofs show the Gray Eagle to be in fault? This vessel was sea-worthy in every respect, experienced officers, a full crew, and competent lookouts in proper positions. They saw the white light a mile off, which was supposed to be a light on shore, or upon a vessel at anchor. They knew that there was good anchorage at that point; and it was natural and consistent with duty for them at first, to consider the vessel bearing the white light to be at anchor, according to the rules of navigation. This would be the first impression on the minds of navigators who understood their duty; and such is the legal presumption. The Gray Eagle was then kept away about a point, and steadied on her course to give berth to the light, which was her duty. The light was not discovered to be a vessel's light in motion, until the Perseverance got within three lengths of the Gray Eagle. It is urged that this is a confession of negligence; that the motion of the Perseverance should have been sooner seen. The night was hazy and clear by times, and the water was smooth. A vessel with one white light at such a time, and on a smooth water, will not appear to the beholder at a distance to be in motion, or its course be observable in the absence of some other object. Its course can only be ascertained in the night,

[1] Henry *vs.* The Baltimore Steam Packet Company, 23 Howard, 287; Union Steam Compauy *vs.* New York & Virginia Steamship Company, 24 Howard, 307.

[2] 9 United States Statutes at Large, 382.

at a distance, from surrounding objects. The sails of the Perseverance were visible for nearly a quarter of a mile, but her course and motion might not be. The Perseverance saw the Gray Eagle half a mile off, and was running at the rate of six miles an hour, which would have brought her to the Gray Eagle stationary in five minutes. The Gray Eagle, running at about the same rate, the vessels would be brought together in two minutes and a half. It would be contrary to judicial experience to presume that the men on board the Gray Eagle were neglectful of duty under the circumstances, in the absence of satisfactory evidence. Five men at their posts on the deck of the Gray Eagle, observed the white light one mile off, bearing a point on the Gray Eagle's port bow, which they supposed to be the light of a vessel at anchor, or a light on shore. They knew they were in the narrowest part of the straits, and where there was good anchorage. They kept the Gray Eagle away about a point, and steadied her on her course to give berth to the white light. They were watching the light and at last when within three lengths, they discovered it to be a vessel's light in motion. It is not at all probable that the officers and men of the Gray Eagle, in the night time, would be indifferent as to the light ahead.

Each vessel charges the other with changing its course immediately before the collision. The Gray Eagle is charged with having headed up so as to shut off her red light. From the want of competent officers and lookouts on board the Perseverance, and the absence of the second mate when below to call the master, the charge that the Gray Eagle changed her course, is not reliable. The mate of the Gray Eagle, not seeing any other light, ordered the helm hard a-port, so as to pass on the port side and keep off, which order was obeyed. The Gray Eagle could not have run across the bow of the Perseverance, but in my opinion, from the weight of reliable evidence, the Perseverance ran across the bow of the Gray Eagle, and was struck on her starboard quarter. By changing the course of the Perseverance, the red light of the Gray Eagle was shut off, if such was the fact.

The Gray Eagle.

It is alleged that there was confusion on board the Gray Eagle, the lookout and the mate giving different and contrary orders to the wheelsman, but the man at the wheel testifies that he obeyed the orders of the mate, but that it made no difference what order he obeyed, or how the wheel was turned, for the collision could not then be avoided or prevented. The men on board the Gray Eagle testify that they did not change her course, and that they were at their posts and on duty. "What a witness asserts he did at the time, or did not do on his own vessel, is generally more satisfactory evidence of the fact, than the opinions and belief of a dozen others formed from what they supposed they saw or heard on another vessel." [1]

The Perseverance running without the red and green lights and with the prohibited white light, was guilty of embarrassing the men on board the Gray Eagle in their observations as to the motion and course of the Perseverance, as testified by them.

It was the special duty of the Perseverance to avoid collision in her unseaworthy condition. She could ascertain the course of the Gray Eagle by her signal lights, and is supposed to know that collision with the Gray Eagle might occur, and she should have kept away. Estimating three lengths of the Perseverance to be four hundred feet, the distance she was off when first discovered by the Gray Eagle to be in motion, the vessels each running at the rate of six miles an hour, would strike in about twenty seconds. The unavoidable collision would naturally cause some excitement on board the Gray Eagle.

In my opinion it makes no difference if there was a mistake at that crisis, in regard to the wheel of the Gray Eagle. The Perseverance caused the difficulty, and her owners must bear the consequences. Even if the Gray Eagle changed her course, under the embarrassments caused by the Perseverance, when the peril was impending and the collision inevitable, she did not commit a fault. An error committed by those in charge of the Gray Eagle under the circumstances, to avoid an immi-

[1] The Neptune, Olcott, 489—495.

nent collision, will not prejudice her rights in a court of admiralty. I do not think that the Gray Eagle should be adjudged in fault, and thereupon decree that the libel be dismissed.

For opinion of Davis, J. on appeal to Circuit Court, see Volume 2 of this Series, p. 25–, and on appeal to the Supreme Court the decision was again affirmed, 0 Wallace, 505.

The New York Court of Appeals also rule that the fact that one vessel does not carry the prescribed lights does not excuse other craft from proper care and diligence in approaching or passing her; and even though such vessel were entirely without signals, or had negligently and recklessly undertaken to navigate a harbor where she should have come to anchor, if another omit to do what prudent and discreet navigators would have done, and which, if done, would have prevented the collision, the latter is chargeable. Hoffmann *vs.* Union Ferry Co., &c.. 47 New York, 176.

Though a vessel is deceived by the want of proper lights upon another vessel, still if she, with reasonable care, could have avoided the collision, she is still liable. Silliman *vs.* Lewis, 49 New York, 379, and cases there cited.—[*Reporter.*

CURTIS vs. HOME INSURANCE COMPANY OF NEW HAVEN, CONN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1865.

1. YEAR CLAUSE IN POLICY—HOW WAIVED.—Where a policy of insurance contained a clause that the loss shall be paid within sixty days after it has been ascertained and proved, and another that if the loss is not paid, suit is to be brought within one year after the loss, and claim was made within a reasonable time, and further proofs required and the company held out the promise or intimation that it would pay the loss, in consequence of which the plaintiff was prevented from bringing suit within the year. *Held*:—The company cannot be permitted to avail itself of these conditions of the policy.

2. The conduct of the company and the negotiations must be such that the insured, as a reasonable person, is convinced that the company will pay the loss, otherwise he is bound to bring the suit within the time limited.

3. REQUIRING ADDITIONAL PROOF.—As long as the company ask for further proof, and he in good faith is attempting to furnish it, they by their own conduct induce him to believe that it is unnecessary to commence a suit. But as soon as he makes up his mind not to furnish any more proof he has no right to rely longer on the action of the company.

This was an action by Orlando Curtis on a policy of insurance for two thousand dollars, dated April 8th, 1861, on what were called the "Keeler Saw Mills," in Marathon county, Wisconsin.

The policy was originally for a year, and was renewed for a second year in April, 1862. The property was destroyed by fire on the 14th day of October, 1862.

The plaintiff's interest in the property insured was as purchaser at sheriff's sale under a judgment recovered by him against Keeler, the then owner of the property. There was a previous mortgage on the property to Sharpstein, which had been foreclosed, and the defendant claimed that the equity of redemption was gone before the loss under the policy. The plaintiff, however, denied any notice of the foreclosure pro-

ceedings, and claimed that the foreclosure was irregular and invalid. The facts further appear in the charge.

E. S. Smith, for plaintiff.

Robert Hervey & N. C. Perkins, for defendant.

DRUMMOND, J., charged the jury as follows:

The main questions in the case are:

First, Whether the plaintiff had that kind of interest in the property which authorized him to insure it.

There has been considerable evidence introduced upon that subject. I think for the present the court will say to you,—leaving it as I have already intimated, to be considered hereafter if necessary,—that the plaintiff had a sufficient insurable interest in the subject matter of the policy.

If there was a mortgage on the property, given by Keeler, against whom the plaintiff obtained the judgment on which the execution issued, and under which he acquired his right to the property, and that mortgage was foreclosed and the right of the plaintiff to the equity of redemption gone before the property was destroyed, then he ought not to recover anything for the loss. But considering the manner in which that question is left by the proofs, for example the possibility that he might have had the right to come in and have the decree of foreclosure opened, on the ground that he was not actually served with notice; that Sharpstein, who was plaintiff in the proceeding of foreclosure, (as there is some evidence tending to show,) acted as his attorney and trustee for his benefit, I shall leave that matter to you under the instruction that the plaintiff may have had such an insurable interest in the property as to warrant him in making the application and in taking the policy. Of course where a party deals with an insurance company, it must be in entire good faith. If there was any misrepresentation made as to the interest, if for example he was interrogated by the agent of the company as to the nature and character of his interest and he misstated it, it would have

avoided the policy. But it is in proof that he did actually state that the interest he had was under a judgment and execution, which turns out in point of fact to be true. He did not state, I believe, that there was a prior mortgage on the property, and there is no evidence to show that he was interrogated on that point before the issuing of the policy. If there were any intentional misrepresentation made at the time the insurance was effected, as to the value of the property, as that it was worth $2,000, when the fact was otherwise, that would also avoid the policy. A mere mistake made by the plaintiff unintentionally, not in bad faith, as to its value, I think would not avoid the policy. He might suppose the property was actually worth more than it was. The misrepresentation must have been an intentional misstatement as to its value, and it is for you to say whether there was or not anything of that character.

Secondly. Another question made by the defendant is, that by the terms of the policy, it is provided that in case of loss not paid, suit to be available is to be brought within one year after the loss. There is, however, also a provision in the policy that the loss shall be paid within sixty days after the loss shall have been ascertained and proved. I have no doubt this provision in the policy is legal. It is such as the parties could annex to the terms of their contract; so that it was incumbent on the plaintiff, within the time limited by the policy, if he sought to recover in a court of justice an indemnity for his loss, to bring the suit within twelve months; but it would be unfair, if the plaintiff were prevented from bringing his suit within that time, by the action of the company, that the latter should be permitted to avail itself of this condition annexed to the policy, so that the court would instruct you upon that point in substantially the language employed by the Supreme Court of this state; if a claim were made for indemnity against the loss within a reasonable time, and negotiations took place between the parties by which further proofs were required and given within a reasonable time, and the promise or intimation held out that the loss would be paid by the company, and in

consequence of this the plaintiff was prevented from bringing the suit within the time, then the defendant could not be permitted to avail itself of the condition annexed to the policy. But it is absolutely necessary that the party should show that by the action of the insurance company itself, he has been prevented from bringing suit within the time prescribed; in other words, he, as a reasonable person, must be convinced that it was unnecessary for him to bring suit because the company was acting as if it would pay for the loss. If the conduct of the company is such, and the negotiations or communications between the parties are of such a character as to convince a reasonable person that the company will not pay for the loss, then it is the duty of the party who has sustained the loss to bring the action within the time limited.

In this case it is in evidence that various negotiations took place between the parties. The proof of the loss was furnished within a very short time. It was, during the winter of 1862–3, and up to the summer of 1863, declared to be unsatisfactory. Mr. Pattee, who is a party in interest, and who has testified before you, states that he went to New Haven for the purpose of closing this matter up, and it was said at that time, as it had been previously, that the proofs were unsatisfactory.

Now if the plaintiff could see that they were simply waiting for some further proof, and that as soon as this was furnished the loss would be paid, and he was using due diligence, in good faith, to furnish the proofs, it might truly be said that the company, by its own conduct, induced him to suppose that the loss would be paid without any litigation, and therefore that it was unnecessary to commence a suit. As is said in one of the letters introduced before us, "It will be unnecessary for the plaintiff to resort to a court of law, provided the proof shall be furnished in accordance with the conditions of the policy." But the very moment, upon proof being demanded, the plaintiff, Curtis, made up his mind that he would not furnish any more proof, then he has no right to rely upon the action of the company, because there is an end of negotiations.

I cannot commend the manner of Mr. Pattee sticking for

what he considered his rights in relation to the abstract of title. It was not acting precisely, I think, as he ought to have acted. He undoubtedly presumed he was acting strictly according to his rights; at the same time, the law always requires in these cases complete good faith, and a disclosure of all the facts.

It would have been much more in accordance with the relations of the parties for them both to have maintained their temper, and both to have made a fair and full explanation in regard to the evidence. But while saying this, I am also obliged to say that I do not know that it was incumbent on the plaintiff, by the terms of the 9th section of this policy, to furnish the title papers. The language is, "What was the interest of the plaintiff in the property insured?"

This he was required to disclose to the company, when called upon, but I doubt whether he was bound to produce all his title papers. He had already stated to the agent of the company what his interest was, and it seems, in point of fact, that it was ascertained subsequently that there was a mortgage, and that proceedings had taken place under the same.

The remaining question is, if you shall find that the plaintiff is entitled to recover, the amount which you shall find in your verdict. The rule upon that subject is indemnity to the amount of the loss. The policy was upon the Keeler Saw Mills, and for $2,000, if that was their value.

The question is, what loss did the plaintiff sustain in consequence of the fire; of course it could not exceed $2,000 by the terms of the policy, but the plaintiff cannot recover for a greater loss than he actually sustained, and that cannot be beyond the actual cash value of the property destroyed at the time.

As to duty of the insured in disclosing character of his interest, consult Illinois Mutual Fire Insurance Company *vs.* Marseilles Manufacturing Co., 1 Gilman, 236; Commercial Insurance Company *vs.* Spanknelle, 25 Id., 53.

If the agent is informed of the facts connected with such interest, and does not require a statement, the company is bound, even though the interest varies from the conditions of the policy. Atlantic Insuranre Company *vs.* Wright, 22 Illinois, 462; Keith *vs.* Globe Insurance Company, Id., 518.

The Court of Appeals of New York rule that if the officers of an Insurance Company state that payment will be made, and fix a day at which the time for bringing suit will have expired, the company is estopped from availing themselves of the limitation. Ames *vs.* New York Union Insurance Company, 14 New York, 453. Consult also Ide *vs.* Phœnix Insurance Company, Vol. 2 of this Series, p. —, and cases there referred to.—[*Reporter.*

THE GOVERNOR CUSHMAN.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER, 1865.

SMUGGLING LIQUORS.

1. The fact that a cook and waiter smuggled on board a vessel at a Canadian port, a small quantity of distilled spirits, does not subject the vessel to forfeiture.

2. Though the spirits exceeded in quantity the amount allowed to seamen, and were brought on board in vessels different from those prescribed by law, yet as the officers of the vessel had no knowledge of it, and it formed no part of the cargo, it could not be exhibited in the manifest, and the vessel is not liable.

3. The fact that the captain and clerk had drank of these smuggled liquors, not knowing them to be such, does not alter the case.

4. A vessel is not liable to forfeiture for every apparent violation or breach of the revenue laws in regard to cargo; and this is such a case as may be accounted for and explained.

This propeller was seized by the collector at Milwaukee, on the 7th of August, 1865. The information alleges:

1st. That distilled spirits in jugs and bottles, and not in casks or vessels of the capacity of ninety gallons wine measure and upwards—said jugs and bottles containing less than ninety gallons wine measure each—were imported and brought in the propeller, not being for the use of the seamen on board, from the port of Sarnia, in Canada, to Big Summer Island and Fox Island, in the United States, contrary to the 103d section of the Act of Congress approved March 2d, 1799.[1]

2d. That brandy contained in jugs and bottles, and not in

[1] 1 United States Statutes at Large, 701.

casks or vessels of the capacity of fifteen gallons and upwards, was imported and brought in said propeller to the port of Milwaukee, in the United States, from the port of Sarnia, in Canada, the same not being for the use of the seamen on board.

3d. That no manifest containing the said jugs and bottles of distilled spirits, was exhibited at the first port in the United States as required by law.

From the opening of navigation in the spring of 1865, until seized, the vessel was running between Green Bay, Sarnia, Chicago, Milwaukee, and Buffalo, touching at Sarnia.

The cook and a waiter, on the 12th of May, 1865, secretly, in the night time, at Sarnia, purchased and had brought on board the vessel three gallons of whisky, three gallons of brandy, and three gallons of gin. On the 23d of the same month, at Sarnia, they secretly, in the night time, purchased and had brought on board, three gallons of whisky. And on the first of June, at Sarnia, they, in the same manner, and at night, purchased and had brought on board three gallons of whisky.

It was a standing rule of the vessel that no distilled spirits should be brought on board at Canada ports, by employes. And the cook and waiter being aware of the rule, and also of the positive orders of the captain to that effect, in purchasing ship stores at Sarnia, requested that the jugs containing spirits purchased of a grocer there, be secreted in barrels under the stores. They deposited the jugs of spirits in a state-room occupied by the waiter, and in a pantry adjoining the kitchen, out of view. It appeared that distilled spirits were purchased at Chicago and Milwaukee by officers and men, in the several trips of the vessel. Whisky was delivered to workmen at Summer Island and Fox Island. And at these places men drank on board secretly, and carried in bottles placed in their pockets, some of the spirits smuggled at Sarnia with some purchased at American ports. The cook received payment for those spirits so sold.

The captain and clerk drank liquor handed them by the

cook without compensation. They had no knowledge that any distilled spirits had been brought on board at Sarnia or any other Canadian port, by any of the hands, except a case of gin ordered by the captain, until the vessel was seized.

J. B. D. Cogswell, for United States.

Emmons & Van Dyke, for respondent cited *Taylor et. al. vs. United States*, 3 Howard, 197, as to intention to evade the revenue laws, and knowledge and privity on the part of claimants. Also *United States vs. Breed*, 1 Sumner, 159; *United States vs. Riddle*, 5 Cranch, 311; *United States vs. Nine Packages Linen*, 1 Paine, 129.

MILLER, J.—By section 103 of an act of Congress, approved March 2, 1799,[1] "no distilled spirits (arrack and sweet cordials excepted) shall be imported or brought into the United States, except in casks or vessels of the capacity of ninety gallons wine measure, and upwards, * * * on pain of forfeiture of the said distilled spirits imported contrary to the provisions herein described, together with the ship or vessel in which they shall be so imported, *Provided*, that nothing contained in this act shall be construed to forfeit any spirits for being imported, or brought into the United States, in other casks or vessels, as aforesaid, or the ship or vessel in which they shall be brought, if such spirits shall be for the use of the seamen on board such ship or vessel, and shall not exceed the quantity of four gallons for each seaman." And by section 1 of act approved March 2, 1827,[2] brandy may be imported into the United States in casks of a capacity not less than fifteen gallons.

It is conceded that the owners of a ship or vessel are liable for the acts of the captain as their agent, in the discharge of his official duties, but the cook and waiter are mere employes, as hands on board under the control of the captain, and may be discharged at his will, subject to provisions of law and the terms of their employment.

[1] 1 United States Statutes at Large, 701.

[2] 4 United States Statutes at Large, 235.

A cargo of a vessel is the lading of a ship or vessel, the merchandise or wares contained and conveyed in a ship or vessel.

A vessel is not liable to forfeiture for every apparent violation or breach of the revenue laws, in regard to the cargo. Accidental mistakes may be accounted for and explained. Where actions, suits, or informations are brought for penalties, or seizures, and the Government makes out a *prima facie* case, section 71 of the act of March 2, 1799, throws the burden of explanation upon the claimant.[1] And by section 67 of the same act the officers of the customs, after entry made of goods, wares, or merchandise, may, on suspicion of fraud, open and examine the packages. And if any of the packages so examined shall be found to differ in their contents from the entry, then the contents of such packages shall be forfeited: *Provided*, that the said forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the officer or the court, in which a prosecution shall be had, that such difference proceeded from accident or mistake and not from an intention to defraud the revenue. In the case of *The United States vs. Nine Packages of Linen*, 1 Paine, 129, it is decided, that when goods are libelled, under the said section 67, for disagreeing with the entries, and the claimant sets up mistake as an excuse, the circumstance that probable cause of seizure has been made out, does not impose on the claimant the necessity of making out an unusually clear case of mistake. All he has to do is to produce ordinary proof. It was there holden as sufficient and legal excuse for an incorrect entry of goods, that they were entered from an invoice made out in great hurry and agitation, while the goods were packed at Caen, in the absence of the owner, in order to secure them by removal, from an apprehended pillage by Prussian soldiery, who occupied the place. It seems to be the policy of the law, that intention to defraud the revenue may be a proper subject of inquiry, and to allow the claimant to show an accidental omission or neglect.[2]

[1] The Luminary, 8 Wheaton, 407.

[2] The United States *vs.* the Margaret Yates, 22 Vermont, 663.

The distilled spirits mentioned in the information, having been received on board secretly by employes or servants of the vessel, without the knowledge of the captain or clerk, and in violation of a standing rule and positive order, the owners of the vessel would not be liable for their loss. They formed no part of the cargo, to be placed in the manifest as such. Nor should the vessel be subject to forfeiture under the circumstances. The spirits, or such portion as the cook and waiter were not allowed by law, might be liable to seizure.

In the case of *Phile vs. the Ship Anna*, 1 Dallas, 218, it appeared in evidence, that the captain of the vessel had only exhibited twenty hampers of porter, in his official manifest, while a much greater quantity was found on board the ship, besides forty-two hampers landed and deposited in the store of one Smith, and twenty-four hampers actually delivered on shore to the captain himself, agreeably to his order given for that purpose, in the store of claimants. It was known likewise, that a considerable number of hampers of porter had during the passage, been removed from the hold, and stored away in state rooms, filling them from the floor to the ceiling. And it appeared that the owners and their agents had been on board, before the removal of the hampers from that situation and must have seen them. The gross number of the hampers discovered by the informants was computed to a little over eighteen tons. The vessel was rightly condemned, but the charge of the court is instructive, in the following remark: "The case in *Bunburg* is the single one that reaches the point before us. There the question arises whether the goods put on board secretly and unladed without the knowledge of the captain, would occasion a confiscation; and the judges agreed that if it was a small matter and no part of the cargo it would not. The claimant, therefore, to have the benefit of this case should show; 1st, That the subject of the present prosecution is a small matter; 2d, That it was no part of the cargo; 3d, That it was smuggled without the knowledge of the captain." All these positions are satisfactorily established in favor of the claimant. The distilled spirits taken on board in the darkness

of the night, at Sarnia, on the three several occasions, by the cook and waiter, were no part of the cargo, were smuggled without the knowledge of the captain or clerk, and they were a very small matter, not deserving the seizure of the vessel by the collector, in the strict enforcement of the revenue laws, according to their requirements.

The law under which the information is brought, allows to each seaman a quantity of distilled spirits for his use on board, not exceeding four gallons. The cook, steward and waiters in lake vessels are considered and classed as seamen or mariners. They are a necessary part of the crew. They frequently assist in the navigation and care of the vessel at times of pressing necessity. They are allowed a lien in the admiralty for their wages in common with the sailors.[1]

On the 12th of May the cook and waiter brought on board nine gallons of spirits; on the two subsequent occasions they brought on board three gallons. If by the law these men were entitled to bring into the United States four gallons for each, to be used on board, on every trip of the vessel, then they only exceeded their allowance, as to quantity, but on one occasion, to the amount of one gallon.

The policy of the law will not allow seamen to smuggle on board even their own allowance of distilled spirits. The captain is responsible for the acts of the seamen in this particular, in all cases coming to his knowledge. If he consents to such traffic, or connives at it, he may subject his vessel to seizure.

The captain and clerk may have drank of these liquors, without knowledge or suspicion of their having been brought on board at Sarnia secretly, or that the cook and waiter were making merchandise of them. Distilled spirits having been brought on board on all the trips of the vessel at American ports, and freely used and disposed of, the captain and clerk might not suspect that Canada liquors were either drank or purchased at Big Summer and Fox Islands, by persons not belonging to the vessel. The spirits smuggled at Sarnia, being

[1] Flanders on Maritime Law, §§ 438, 440, and notes.

of small bulk and stored away, in disregard of the captain's orders and a standing rule of the vessel, the testimony of the captain and clerk, that they had no idea that the spirits they drank on board or that were drank by others, had been smuggled at Sarnia, is entitled to favorable consideration. It is not propable that this traffic in foreign distilled spirits on board the vessel would be allowed. Domestic spirits may be drank or sold on board without risk of forfeiture of either the spirits or the vessel. And it is no cause of forfeiture under the act, for a seaman to extend the courtesy of his bottle of foreign spirits to an officer without compensation, in the absence of knowledge on the part of the officer, that such spirits had been smuggled.

The captain had a legal right to order on board the case of gin, not exceeding four gallons, which he used on board.

The distilled spirits mentioned in the information not having been received on board as part of the cargo, it was not placed in the manifest, and the vessel is not liable for not exhibiting a manifest containing it, at the first American port touched at, after leaving Sarnia.

I am satisfied that the information should be dismissed.

THE ALLEGHANY.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM, 1865.

IN ADMIRALTY.

1. DUTY OF PROPELLER ENTERING HARBOR.—A steam vessel entering a harbor is bound to observe the utmost vigilance to avoid collision with other vessels, and a propeller is negligent in entering the harbor of Milwaukee at the rate of eight miles an hour.

2. Having exchanged signals with a tug towing out a schooner, she is bound to keep the side of the channel agreed upon. If she sheers or refuses to obey the helm it becomes her duty to stop.

3. DUTY OF TUG MEETING.—The tug is entitled to half the river, and is not bound to keep close to the pier.

4. The tug with her tow had the character of a steamer going out on her own course, agreed upon with the propeller, which course she was bound to keep, and had the right to, exclusive of the propeller.

5. If she had attempted to cross the channel on seeing that the propeller sheered, and did not obey the helm she would have done so at her own risk, and there is no obligation upon her to maneuver in reference to the course of the propeller.

The libellant, Bernard Goldsmith shipped on board the schooner Henry C. Winslow a cargo of oats, at Milwaukee, to be carried to the port of Buffalo. On the 7th of May, 1864, the schooner left her dock in the Milwaukee river, in tow of the steam tug W. K. Muir. It was broad daylight and clear, wind from the southwest. Shortly after leaving the dock, the captain of the tug, seeing the propeller Alleghany coming inside the piers, signaled her by one whistle to keep the starboard or right side, the usual signal in like cases; the propeller replied by a like signal; the tug signaled a second time, when the propeller was about ten rods distant, which was replied to as be fore; the propeller struck the schooner on her port cat-head,

cutting her nearly to her keel, so that she sunk within fifteen minutes.

The answer admits the signals from the tug by one whistle, to keep to the starboard side, the tug then being above the piers, which was answered by a like signal; the second signal, when the propeller was about ten rods off, is also admitted.

It is also admitted that the propeller and schooner collided between the harbor piers, and that the propeller struck the schooner, and cut into her, so that she sunk as charged in the libel.

It is also admitted in the answer, "that the propeller proceeded up about the center line between the piers; that in proceeding so far to the starboard side of such channel, the propeller, drawing eleven feet two inches of water, dragged the bottom, so that she would not mind her helm; that the propeller proceeded up about the center line between the piers, gradually losing her speed." The proof was that on account of her speed and draught of water, the propeller steered wildly, sheering from side to side, and not answering her helm.

The propeller Alleghany came up to the piers from the south, having run from Chicago at the rate of about ten or eleven miles an hour; and on a strife with the propeller Maine coming in from the north, she entered the piers ahead. The rate of speed of the Alleghany entering the piers was eight miles an hour. The piers are eleven hundred and fifty feet in length, extending east and west, and about two hundred and sixty feet apart. The length of the schooner was about one hundred and thirty-seven feet. The collision occurred about two lengths of the schooner, from the mouth of the river, between the piers.

Emmons & Van Dyke, for libellant cited:

Union Steamship Company vs. New York, &c., Steamship Company, 24 Howard, 307; *Sturgis vs. Beyer*, Id., 110; *Waring vs. Clarke*, 5 Howard, 441; *Wheeler vs. Steamer Eastern State*, 2 Curtis C. C. R., 141; *The Anita vs. Steamboat Anglo-Norman*, 1 Newberry, 492; *Clapp vs. Young*, 6

Law Reporter, 111; *Ward vs. The M. Dousman*, 6 McLean, 231; *Culbertson vs. Shaw*, 18 Howard, 584; 3 Kent, 231; *The Neptune*, Dodson, 467.

E. Mariner & Wm. P. Lynde, for respondent.

MILLER, J.—There is the usual conflicting testimony in collision cases. Several persons who were on board the propeller as passengers and otherwise, in a set of stereotyped answers, testify that at the time of the collision she was nearer the north pier than the south. This is in contradiction of the answer and the other evidence. The answer states that the propeller kept in the center between the piers; and the proof is that at the time of the collision her bow was fifty feet south of the center, heading south-westward. It is satisfactorily shown that immediately before the collision the engines of the propeller were reversed.

It is not necessary to a correct decision of the question of fault, on the part of the propeller, to examine at length the volume of evidence submitted. The facts above stated from the pleadings show satisfactorily that the propeller was in fault.

The well-established rule, that a steam vessel entering a harbor is bound to observe the utmost vigilance to avoid collision with other vessels, was not observed by the propeller in the following particulars:

1. The propeller entered the harbor from the lake at too great speed. The rate of eight miles an hour is not allowable. A steam vessel entering between the piers from the lake, even on slackening her speed by shutting off steam when inside, may not be in condition to stop or reverse in time to avoid collisions with vessels under way out. "There being no usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care under such circumstances will not excuse a steamer for a wrong done." The length of the piers is too short and the space between them too narrow to admit the ordinary maneuver of vessels in the open sea to avoid col-

lisions. The collision occurred about nine hundred and thirty feet from the outer end of the piers. At the rate of eight miles an hour, the propeller would reach that point in less than one minute. If checked in speed one-half on her way up, she would reach that point in one minute and one-half. By running in at that rate, and a tug with a schooner in tow in full view meeting her, the propeller must take the responsibility.

2. The signal was given the propeller in due time to keep to the right side, which was answered in like manner. It then became the duty of the propeller to keep the right or north side of the center between the piers, which she did not; and at the moment of the collision her bow was about fifty feet south of the center, heading into the schooner.

3. When the propeller sheered, and did not answer her helm to the starboard, steered wildly and was unmanageable, it was the duty of the master to stop her until the tug and schooner had passed. The propeller had full power to stop at any time, and to reverse. She did not stop in time to avoid the collision.

It is alleged that the tug was in fault for not keeping close to the south pier, and out of the way of the propeller. The tug was entitled to one-half the channel or space between the piers. The signals settled that matter between the propeller and the tug. The captain of the tug even on seeing that the propeller sheered, and did not answer her helm a-starboard, would have risked collision at his expense by running the tug in reference to the course of the propeller, or to have steered towards the north pier. There was no obligation upon the tug so to maneuver at its own risk of comdemnation in case of collision. The tug was on its own course, and had the right of it, exclusive of the propeller.

It is true that the tug was not in the range of a sailing vessel, requiring steamboats to keep out of the way. The tug had the character of a steam vessel, going out of port, on its own course, agreed upon with the propeller, which it was bound to keep.

The wind being from the south-west, although not very

strong, yet striking the schooner on her starboard, it is not probable that she would be a-starboard of the tug. It would require a quick movement on the part of the tug to bring the schooner into line at the point of entrance into the piers. The tug at the time of the collision was heading south-eastward, and could not have advanced much further on that course without running on the south pier. In this movement the tug was making way for the propeller.

In the answer it is stated, " that the master of the propeller saw the schooner descending the river in tow of a tug. He immediately caused the steam to be shut off entirely from the engine of the propeller, in order that the schooner might get between the harbor piers before he met her. And that when the schooner had got within five hundred feet of the propeller, the master of the propeller saw that the vessels, if they proceeded at the speed at which they were going, and upon the same courses, must meet in the bend of the river where it turns out of the old channel to come into the straight cut between the piers, gave the order to the engineer to reverse the engines of the propeller, and that thereupon the engines were immediately reversed." The tug and schooner being in the bend of the river where it empties into the straight cut between the piers, and the captain of the propeller, knowing that to be a difficult point of navigation, particularly for a tug with a vessel in tow, and requiring an effort at that point on the part of the tug to keep its tow in line, preferred meeting them inside the piers, where there was less danger of collision. Whatever fault there was, consisted in the propeller running up too far. The tug was running at a rate of between three and four miles an hour, and if the propeller was then running at four miles an hour, it is evident that a collision must occur before the propeller could assume a backward movement.

It was also argued, that the tug was in fault for allowing the men on board the schooner to be setting sails coming down the river. It was a matter of duty and of necessity to prepare the vessel for navigation and protection, before passing out into the open lake. In less than two minutes, if the col-

lision had not occurred, the schooner would have been cast loose from the tug in the lake.

It was alleged that the master of the tug seeing the unmanageable condition of the propeller, in not answering her helm, should have stopped. If the tug could have stopped, what would have become of the schooner? She could not be stopped short of being turned completely around in the way of the propeller, and with greater certainty of collision.

From examination of the pleadings and evidence, my opinion is, that the propeller is in sole fault of the collision, and a decree is ordered accordingly.

On appeal to the Circuit Court, this case, after full argument, was affirmed by Davis, J., sitting as Circuit Judge, his opinion being reported in Volume 2 of this Series, p. 29.

The Supreme Court also again affirmed this decision, 9 Wallace, 522.

As to duty of steamer in crowded harbor, see The Corsica, 9 Wallace, 630; The Johnson, Id., 146; The City of Paris, Id., 634; The Syracuse, 6 Blatchford, 238; Brunswick *vs.* The Sea Gull, 16 Pittsburg Law Journal, 194.

As to duty of tug, Hern *vs.* The Anthracite, 2 Legal and Insurance Reporter, 58; Smith *vs.* The Creole, 2 Wallace, Jr., 485; Sproul *vs.* Hemmingway, 14 Pickering, 1; The Express, 1 Blatchford, 365; Snow *et al. vs.* Hill, *et al.*, 20 Howard, 543; New York, &c., Transportation Company *vs.* Philadelphia, &c., Navigation Company, 22 Howard, 461.

Boats in tow and exclusively under the control of the tug, are, as respects other vessels, to be considered vessels under steam, The Pennsylvania, 3 Benedict, 215.

A tug with a tow lashed alongside is considered as one vessel and that a steam vessel, and must follow the rules of steam vessels. Railroad Company *vs.* Schooner Manton, 11 American Law Register (N. S.), 769.—[*Reporter*

HAZARD vs. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1865.

1. PASSENGERS ON FREIGHT TRAINS.—A Railroad Company when it takes passengers as such on its freight trains, is under the same obligation to carry them safely as if they were on the regular passenger trains, but such travelers acquiesce in the usual incidents and conduct of a freight train managed by prudent and competent men.

2. It is immaterial how many such passengers the company carries, and whether they travel on special permits or regular tickets.

3. DUTY OF RAILROAD COMPANY.—A Railroad Company in the transport of passengers, though not the insurer of their lives, is required to use the utmost skill and diligence in carrying them safely, and to employ all those means peculiar to this mode of transit known to skillful and competent persons; but the passenger must have that care and regard for his own safety and security which devolves on a prudent man under the circumstances.

4. DUTY OF TRAVELER.—A passenger not rightfully in a certain position cannot complain of the absence of the proper safeguards.

5. Although an accident may have been the result of the negligence of the company's agents, still if a prudent man would not have been where, and as the plaintiff was, he cannot recover.

6. The effect of a former trial in the state court considered and stated.

The plaintiff, on the 29th of June, 1860, was at Kewanee, a station on defendant's railway, and purchased a passage ticket for Galesburg, where he then resided, and took passage in a freight train, which had, what is termed, a way or caboose car attached. The train consisted of twelve to fifteen cars. The way car was in most respects like a freight car, with doors on each side. It had also a door at each end, and a platform with steps. For this platform there was a railing, but on the rear platform there was no chain or bar extending across, so that there was an open space in the rear and center of the platform.

The way car had seats which extended lengthwise at the sides. These freight trains occasionally carried passengers, and the agent who sold the ticket, and the plaintiff when he took the passage, knew the character of the train. The train approached Galesburg about eight o'clock in the evening. Just before its arrival, and while it was yet in motion, at the rate of about three or four miles an hour, the engineer having cut off the steam, the plaintiff being the only passenger in the way car, asked the conductor where the train would stop, and was informed that he, the conductor, did not know. The plaintiff then stated to the conductor and pointed out the part of town in which he lived, and then, according to the account given by the plaintiff, the conductor said, "You had better get off at the next crossing. The train will be running slowly past there, and you can step off on the sidewalk with ease and safety." The statement of the conductor was that he told the plaintiff that business men sometimes jumped off the train at Main street, (the crossing), and the plaintiff replied he guessed he would get off. The plaintiff then rose from his seat, took his carpet-bag in one hand and a whip and umbrella in the other, and started to the forward part of the car and opened the door. The conductor, who was in the act of closing the side doors, told him not to get out there, but to go to the door in the rear end of the car. The plaintiff then shut the door, and turned towards the other end of the car. As he approached the back door, and when within a few feet of the back door, the engineer took up the slack of the train, by putting on steam. The conductor had closed both the side doors, and was near but behind the plaintiff. The back door was open. At that moment, the way car received a sudden jerk, and the plaintiff was precipitated through the door and the open space already referred to, and was thrown on the ground and seriously injured. The relation given by the conductor was that when he told the plaintiff he had better not get out at the forward door, the plaintiff replied that he guessed the other door would be the safest, and came to the back door, and was in the act of stepping out, his right foot going over the threshold when the

jerk came. The plaintiff declared that when he started to go to the rear end of the car his intention was to go on to the platform and to the left hand steps and step down and wait for the crossing, and if the cars were going so slow that he could step off with ease and safety he would have done so, otherwise he would have remained on the cars.

The plaintiff soon after his injury brought a suit in the state court against the defendants and obtained a judgment which on appeal to the Supreme Court was reversed, and the case remanded. The case is reported in 26th Illinois, 373. The plaintiff then dismissed his suit and commenced his action in this court.

E. A. Storrs, for plaintiff.

Walker & Dexter, for defendant.

DAVIS, J., charged the jury as follows:

We think a railway company, when it takes passengers as such on its freight trains is under the same obligation to carry them safely as if they were on the regular passenger trains—but, of course, the passenger taking the freight train accepts it and travels on it, acquiescing in all the usual incidents and conduct of a freight train managed by prudent and competent men—no more and no less. And we consider it immaterial whether the company carries more or less passengers in its freight trains, and whether or not the passenger travels on a special permit or a regular ticket.

The contract between the parties was, that for a consideration paid by the plaintiff, the defendant agreed to carry him safely from Kewanee to a usual place of stopping at Galesburg, on its freight trains. If there was more than one place of stopping the plaintiff accepted the contract on that condition.

In order to maintain the action, the plaintiff must show that the contract on the part of the defendant has been violated in consequence of some fault or negligence of its employes, or through some defect in the means of transit, and it must appear that his own fault or negligence did not contribute to the injury.

A railway company in the transport of passengers, though not insurers of their lives, is required to use the utmost skill and diligence in carrying them safely, and to employ all those means peculiar to the mode of transit known to skillful and competent persons at the time. But it must be understood that a passenger, while on the train and connected with it, must have that care and regard for his own safety and security which devolves on a prudent man under the circumstances.

There are but two questions in this case which can be regarded as matters of controversy.

First. Was the injury to the plaintiff caused by the negligence, want of care or skill on the part of the defendant.

Second. Was the plaintiff himself guilty of any fault, negligence or carelessness, which contributed to the injury, and would prevent him from recovering?

Was the conduct of the plaintiff, under all the circumstances of the case, that of a prudent and careful man? He had been told by the conductor that he had better get off there, or that others did get off there. He took his carpet-bag, umbrella and whip, and was in the act of going out of the door, or approaching it, when the car was jerked—the train being in motion at the time, at the rate of three or four miles an hour. And if he acted imprudently or carelessly, did that contribute to the injury complained of? If it did, then the plaintiff cannot recover. It is insisted that the plaintiff's conduct at the time was the result of the direction or suggestion of the conductor. The jury may be satisfied that the plaintiff was leaving the car under the advice or suggestion of the conductor; but if that were given, of his own motion merely, without authority from his principal would it justify a prudent man in alighting from a car when thus in motion? And upon this part of the case it is for the jury to say whether the plaintiff exercised common prudence in attempting to alight from the car while in motion, and, if not, whether such omission contributed to the injury. Was there any such negligence on the part of the plaintiff that but for it the injury would not have been received?

Was there fault or negligence on the part of the defendant? It is claimed the defendant was guilty of negligence, on two grounds:

First. In the act of the engineer causing a violent jerk to the rear car by too suddenly taking up the slack of the train; that is by tightening too quickly the coupling of the cars.

Secondly. By the want of a good chain or bar on the center part of the rear platform.

A great deal of testimony has been given as to the necessity of jerking with more or less force the rear car of such a train as the plaintiff was on in this case. On the one side it is claimed it is unavoidable; on the other that by the use of proper caution and skill it can be prevented. In weighing the evidence of this part of the case, the jury should examine it with reference to the kind of train run, and to the skill and prudence which could be applied at the time, as known and practiced by competent agents. If a skillful engineer could, at the time, by the use of proper caution, have avoided giving a jerk to the rear car, then it must be treated as a fault that it was not prevented. But if the jury shall find that some kind of jerk was unavoidable, could the engineer be required to measure and could he be expected to know the exact degree of force which in a long train would be applied to the rear car? The jury should candidly and impartially consider all the evidence bearing on this point, and test the facts by the circumstances shown to exist at the time, and which were known, or ought to have been known, to competent agents.

The proof establishes that there was no guard chain or bar in the center of the rear platform. The same principles are applicable to this point as to the last. It seems to be admitted that as a general thing it was not used on a way or caboose car at the time of the accident. This must also be tested by the degree of skill and prudence required at the time from careful and prudent agents. And the jury should also bear in mind the manifest object of the railing on the platform, viz: the protection of persons when they are rightfully on the platform in getting on or off the car, and if the plaintiff was not

rightfully where he was at the time of the jerk, he cannot complain of the absence of the guard chain.

From what has been already said, it will be seen that a party may be guilty of some fault and that may not prevent him from recovering, and we think the case on trial must turn upon this. At the time of the jerk was the plaintiff rightfully where he was, and for the purpose he had in view, and was the jerk the result of negligence on the part of the agents of the defendant? If under the facts and circumstances as you may find they existed at the time, a prudent man would have been where the plaintiff was at the time of the jerk, and the jerk could have been avoided by the exercise of proper skill and caution, then the plaintiff may recover, but on the other hand if you believe a prudent man would not have been where, and as the plaintiff was at the time of the jerk, and for the purpose of alighting from the car, then we think he cannot recover, though the jerk may have been the result of negligence on the part of the defendant's agents.

These are our opinions of the law of the case, treating it as an original case.

When the case commenced in the state court, was remanded from the Supreme Court to the court below for the reason already stated, the plaintiff voluntarily dismissed it, and some time after commenced a suit in this court for the injury sustained.

We have already decided that, as the opinion of the Supreme Court of the state was founded on the facts as they then appeared, the plaintiff had the right to establish other and different facts concerning the cause of the injury, and, therefore, the plaintiff has been permitted to introduce any evidence in his power having a bearing on the case, and that evidence is before you. There is also in proof the facts which were established on the trial of the cause in the state court, on which the opinion of the Supreme Court of Illinois was based; and, we think, if you shall find the facts as established here in all material respects the same as proved in the state court, then the opinion of the state court is conclusive against

the right of the plaintiff to recover here, otherwise not. Of course, it is of no consequence that the volume of evidence on both sides is much greater than in the state court. The question is whether the cause of action is the same, and the facts, as proved here, are, in all substantial particulars, the same as established in the state court.

The record of the state court is in evidence. It contains the bill of exceptions, the evidence offered in the former trials, and the opinion of the Supreme Court. It is admissible only for the purpose of showing whether or not the facts as proved there affecting the case are substantially the same as shown in the trial here. We have already stated what the Supreme Court of Illinois decided. It would not be proper for the jury to consider the opinion of the Supreme Court, or to discuss its correctness, or the correctness of the views of any one of the judges of the Supreme Court.

If the jury, under these instructions of the court, should find it necessary to consider the question of damages, the rule would be that the jury should allow to the plaintiff such just and reasonable sum, as compensation for the injury, for the pain and suffering he has undergone, and the expenses, etc., he has incurred in consequence thereof, as under all these circumstances of the case they think he may fairly be entitled to receive from the defendant.

Drummond, J., concurring.

The jury failed to agree.

A recovery may be had though the passenger was not in the usual passenger cars. Philadelphia, &c., Railroad Company *vs.* Derby, 14 Howard, 468.

Edgerton *vs.* New York and Harlem R. R. Co., 39 New York, 227; Galena and Chicago Union R. R. Co. *vs.* Fay, 16 Illinois, 568.

If a person enters the saloon car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the railroad company incurs the same liability for his safety as if he were in their passenger train. Dunn *vs.* Grand Trunk Railway, 58 Maine, 187.

Consult, also, Bridge *vs.* Grand Junction R. R. Co., 3 Meeson and Welsby, 244; Stokes *vs.* Saltonstall, 13 Peters, 181; Galena & Chicago Union R. R. Co. *vs.* Jacobs, 20 Illinois, 478.—[*Reporter.*

SCOTT vs. CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1866.

OBSTRUCTIONS BY BRIDGES IN CHICAGO RIVER.

1. DUTY OF CITY.—The city of Chicago is bound to use proper care and precautions to allow vessels to pass the bridges across the Chicago river. If a vessel gives notice to the proper persons that she intends to move up or down the river, it is the duty of the city to prepare for her passage, and remove any obstacles which may appear. If no notice is given until the whistle sounds, then the proper efforts must be made as soon as practicable thereafter.

2. After ice has formed in the river, less vigilance is required than during the season of navigation. When a vessel has given notice, the same exertion must be made as ever.

3. STATE OF THE WEATHER may be considered, and as it is one of the incidents of a bridge, that snow and ice may interrupt its movement, all that can be required of the city is the use of every reasonable effort, as soon as practicable, to remove the obstacle.

4. MEASURE OF DAMAGES.—If the city has been guilty of negligence, and in consequence a vessel has been obliged to cut her way out of the ice, the damages would be, 1st, the necessary expense incurred; 2d, reasonable damages for the delay; 3d, the damages actually sustained by the vessel. But no damages can be given for injuries sustained in doing anything not warranted by skill and prudence.

This was an action on the case by Dwight Scott, owner of the propeller S. D. Caldwell, for damages caused by the neglect to open a bridge across the Chicago river, on account of which the propeller was frozen in, and delayed and damaged. The facts further appear in the charge.

H. F. Waite, for plaintiff.

S. A. Goodwin, for defendant.

DRUMMOND, J., charged the jury as follows:

On the afternoon of the 31st day of December, 1863, the

propeller S. D. Caldwell, of which the plaintiff is the owner, having had some repairs made in the dock of Doolittle & Olcott, on the south branch of the Chicago river, was proceeding down the river, stern foremost, with the purpose of going to Milwaukee, to carry out a contract made by the propeller to run between that port and Grand Haven, Michigan. There was considerable ice in the river at the time, which, though impeding the progress of the propeller, did not prevent her from making her way somewhat slowly down the river.

Having reached the Madison street bridge, she gave the usual notice by whistle of her approach.

The bridge tender and assistant were absent. On the return of the latter, he made some efforts, with the aid of others, to open the draw, but failed, owing, as it seems, to some snow and ice, or other obstacle getting in between the moving and stationary part of the bridge. The weather was becoming cold and the following day, the 1st of January, 1864, was of unexampled severity; so that some of the persons engaged in trying to open the bridge on that day had their hands and feet more or less frozen. The bridge-tender returned on the 2d of January, and the next day they succeeded in opening the bridge and the propeller passed through. But in the meantime the cold had so much increased and strengthened the ice, that after winding and trying with her bow, which was cased in iron, to force her way through, the propeller, after some days of trial, relinquished the attempt to go out in that way, and a contract was made with some parties, at a large expense, to cut the ice, by means of which, at length, on the 16th day of January, the propeller was enabled to proceed into the lake and to Milwaukee, where she arrived on the same day. In trying to go through the ice in the river, the propeller sustained considerable damage, and for this, the delay, and the additional expense, the action is brought against the city.

The only material fact controverted, is as to the notice given to the city authorities on the 30th of December.

It is claimed on the part of the propeller that on that day notice was given to the proper persons that the propeller

would pass down the river on the following day. This is denied by the city, and it is contended that no such notice was given.

The only aspect in which this fact is of importance, is the bearing it may have on the question of care and diligence of the city under the circumstances; because, if notice were actually given on the day before, it was the duty of the city authorities to take measures immediately to remove any obstacle which, upon inspection, might appear to be in the way of opening the bridge; whereas, if no notice were given, as navigation in the south branch was generally closed for the season, the same degree of preparation might not be expected on the part of the bridge tender. But in any event, it was the duty of the city, upon the approach of the propeller, to use all proper and reasonable efforts to open the bridge, looking at the circumstances as they existed at the time.

The Chicago river is a public navigable highway, and vessels have the right to pass up and down, without unnecessary detention; and consequently the propeller S. D. Caldwell had the right to go down the river at the time mentioned. But the right of navigation does not take away the right of crossing the river, and it must be considered settled that the city has the power to construct bridges for the purpose of crossing, provided the bridges are so constructed and maintained as not materially or unnecessarily to obstruct navigation. The two rights co-exist, and each one must be construed with reference to the other, precisely as we qualify the right to travel along a street by the right to cross it. The navigator must yield something to the foot passenger, just as the latter must yield something to the navigator.

Generally, and perhaps with reason, the navigator has the preference on the Chicago river, as he is permitted to pass at once, while foot passengers and vehicles are constantly being stopped in the season of navigation, in their efforts to cross the bridges.

It follows, from what has been said, that the Madison street bridge was properly there, and the only question in this part

of the case is: Was every thing done that under the circumstances ought to have been done by the city authorities to enable the propeller to pass through the bridge?

There is no serious objection made to the construction of the bridge, which was what is termed an iron bridge, and moved upon what is called a turn-table on a pier in the middle of the river. The main complaint on the part of the plaintiff is that proper precautions were not taken by the bridge-tender, and that the necessary assistance was not there at the time.

Whether this complaint is well founded, must be determined by the light of the facts found to exist when the application was made to pass the bridge. If notice were given the previous day, then, so far as it was practicable, the proper efforts should have already been made; if no notice were given till the whistle sounded, then the proper efforts should have been made as soon as practicable thereafter. It may be assumed that at the time notice was received, considering the season of the year, the ice in the river, the non-passage of vessels for some days through the bridge, the same degree of vigilance could scarcely be looked for as in the midst of the season of navigation; but, making due allowance for this difference, there ought to have been the same exertions made as at any other time. But of course the jury will take into consideration the state of the weather. For example, while it was the duty of the city to keep the bridge in a condition to be turned, when steamers or vessels could pass up or down the river, still it is one of the incidents of a bridge so constructed that snow and ice may occasionally interrupt the movement, and if, by a sudden change of weather, ice should form so as to obstruct the turning, all that could be required would be the use of every reasonable effort, as soon as practicable, to remove the obstacle. I think every exertion should have been made that, under the circumstances, was practicable, to allow the propeller to pass that night.

The question is not precisely, whether those there did what they could, but is rather, whether there was the necessary and competent assistance there at the time, and whether, if it had

been and proper exertions made, the result would have been the same. The probability seems to be that if the propeller had got through the bridge immediately, she would have reached the mouth of the river that night. If it was not practicable to open the bridge that night, was everything done that could in reason be done on the next day and the following day to accomplish it? The cold was intense on the first of January, and the evidence shows that it was with difficulty that men could work in the open air, and yet what could be done ought to have been done.

On the whole, I shall leave it to be decided by the jury whether the city authorities did all that was required of them, all that skill and diligence could effect, to accomplish what the propeller demanded, viz: the opening of the Madison street bridge in order that she might pass down the river as soon as possible.

If the city in all respects performed its duty, then the plaintiff cannot recover, but if it was guilty of neglect, and in consequence thereof the plaintiff has sustained damage, then the city may be held responsible for the loss. If you shall find that the city was guilty of a neglect of duty, and that the plaintiff has thereby suffered damage, the next question is as to the amount of the damages. These would be,—in case the jury find for the plaintiff:

1. The necessary expense paid by him in cutting the propeller out. Though a larger amount was originally agreed on, yet the sum actually paid was $600.

2. The value in the nature of demurrage of the propeller while necessarily detained by the act of the defendant, and in such a manner as fully to idemnify the plaintiff for any loss sustained by him in consequence of such detention.

3. The damage that the propeller actually suffered through the neglect of the city authorities. But the jury should not give anything for injury received in doing what skill and prudence would not warrant the propeller to do. For example, if the propeller persisted in forcing her way through the ice longer than skill and prudence would justify, before the con-

tract for cutting the ice was made, then for such injury compensation should not be given. But it is for the jury to determine how far the damage done to the propeller was the result of want of skill or prudence on the part of the propeller and how far it was the result of the fault of the city authorities.

Verdict for plaintiff.

POTTER vs. SCHENCK.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY TERM, 1866.

IN EQUITY.

1. VARIETY OF FORM NOT A CHANGE OF PRINCIPLE.—When a mechanic has the leading idea which is developed in Wilson's patent, once thoroughly understood and fixed in his mind, he can carry out that idea in a variety of forms, simply by the exercise of mechanical ingenuity, which nevertheless are not substantial variations from the invention patented.

2. Merely reversing the feeding bar of Wilson does not change the principle of his invention.

3. INJUNCTION—WHEN GRANTED.—An injunction being the strong arm of equity, ought never to be granted without the most complete conviction, on the part of the court, of its absolute necessity.

4. If it be true that the patentee is entitled to his claims of invention as his property, there is an end to all hardship, because no man ought either in law or in morals to use the patentee's property without compensation and without his consent.

This was a motion for a provisional injunction to restrain defendants from infringing letters patent for "improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850, re-issued January 22, 1856, and extended for seven years, November 12, 1864. The defendants were selling single-thread sewing machines in which the cloth was advanced by a sliding presser foot, provided on the lower side with serrations pressing the cloth against the table or platform on which it rested.

The facts appear in the opinion of the court.

S. S. Fisher, for complainants.

J. Edwards Fay and *Bonney & Griggs*, for defendants.

DRUMMOND, J.—The alleged infringement consists in the violation, on the part of the defendants, of the patent of Allen B. Wilson, obtained in January, 1856, called re-issue No. 346, and is for the feeding apparatus of the sewing machine and its appurtenances. It contains four claims.

One is for the method in which the cloth is moved by what Wilson calls the joint action of two surfaces between which it is clamped, and which act in a particular way so as to cause the cloth to proceed forward in the operation of sewing.

Another is the arrangement by which, in the operation of sewing, the cloth is held by the needle so as to prevent the cloth from moving backward during the return of the feeding apparatus.

A third is a mode by which the cloth is retained in its position and the needle permitted to escape, called stripping.

The fourth is the manner in which the upper surface is arranged or mounted, so as to enable the operator to lift it from the cloth in order to remove the latter.

This is a very general statement of the claims, and, of course, would not be understood except by those who had examined the specifications, or were familiar with the operation of the machine.

There is no controversy as to the validity of the patent on the claims set forth; the only question is as to the infringement.

It is alleged that the defendants have not infringed the claims set forth in the schedule of Wilson.

The examination, perhaps, would have been more satisfactory if there had been a model of the machine here precisely of the form of the part in question, in which it was originally devised and used by Wilson. The machines that are now operated by the plaintiffs, it is conceded, differ in form from that which is described in the claims of Wilson in 1856.

Still, the apparatus, as now used, enables us to understand how it was employed in the machine when constructed in conformity with the specifications of Wilson.

The machines, now, have what is called the four-motion feed. According to the specifications and the proof, the arrangement of Wilson was to have something in the form of a shoe beneath the plate, upon which the cloth was placed, the upper suface of which was roughened by saw-teeth cut upon it. This shoe acted through an opening in the plate, and a motion was given to it backward and forward, so that when there was a pressure from above upon the cloth which was lying upon the plate, sufficient to force it upon the shoe, the teeth caught the cloth and carried it forward. This was the first claim. Then, when the shoe ceased to act, the needle pierced the cloth so as to prevent it from coming back; and that was the second claim. There was also an arrangement by which the cloth was held by the spring which created the pressure from above, so as to prevent it from rising and moving as the needle was withdrawn, and thus accomplished the process of stripping, as it was termed, in the third claim.

Then there was another arrangement by which this spring that presses upon the cloth was raised, so as to enable the operator to remove the cloth from the machine.

That substantially was the manner in which the feeding apparatus, as described by Wilson in his specifications, operated, and the question now is whether the apparatus used by the defendants interferes with or incorporates in itself the invention of Wilson in whole or in part. So far as I have been able to examine the question, I think that it does.

The machine of the defendants is a single thread sewing machine, one of the cheap kind. The main difference in the construction of the defendants' machine and that of Wilson, as to the feeding apparatus is this: in the machine of the defendants, the principal part of the feeding apparatus is placed over the plate upon which the cloth rests, instead of underneath. It is in fact in the form of a shoe more distinctly than that used by Wilson. This shoe is pro-

vided with saw teeth on the under side, and is made to press upon the cloth from above, substantially in the same way as the one used underneath the plate by Wilson, presses upon the cloth from below. The purchase as obtained by this pressure, and the teeth operating from the top instead of from the bottom, move the cloth forward. Then the needle goes in in the same way substantially and holds the cloth when the shoe is drawn back. The shoe also holds the cloth down or strips it from the needle when the latter is drawn up, and it is so connected with the upper part of the machine as to enable the operator to lift it and remove the cloth.

The question is, whether this is a substantial variation in all or any of its particulars, from the invention of Wilson as described in his specifications of 1856. I have already stated that it is not, and, as it seems to me, on this ground, viz: that when a mechanic has the leading idea which is developed in Wilson's patent, once thoroughly understood and fixed in his mind, he can carry out that idea in a variety of forms, simply by the exercise of mechanical ingenuity. Here was a great leading principle in the feed of the machine, devised and invented by Wilson. He, to be sure, describes the particular manner in which he carries out that idea; but once get that in the mind and it is clear that you can carry it out in a variety of forms. This is, it may be said, an ingenious variation or difference by which the idea of Wilson is carried out.

The shoe or main part of the feeding apparatus, is not placed beneath the plate upon which the cloth rests, but is on the top of the plate, or, as was contended and I think with a good deal of force, by the counsel for complainants, instead of being placed as Wilson describes it, it was merely reversed. It is clear that that does not change the principle of the invention, and it is clear, too, as already stated, that a mechanic once having the idea in his mind could apply it by adopting a great variety of forms and devices, and this among others.

This device of Wilson's has been the subject of a great deal of litigation as is set forth in the bill. The claim has been contested with all the skill, ingenuity, and ability which could

be brought to bear in this country upon a question which involves not only so much of personal and individual, but also so much of public interest, as a machine like this, which, it may be said, comes home to every family.

The invention of Wilson has stood the test of all this protracted and severe litigation; and it is shown by the proof that machines similar in their character to the machines used by the defendants have already come under judicial examination, and have been held to be infringements of Wilson's patent.

Now I understand and fully appreciate what was pressed with so much zeal and pertinacity by the counsel for defendants, that patentees frequently, by the monopolies of their inventions, accumulate wealth, form combinations, and may wear out men of inferior means in litigation. I understand, too, that it is not uncommon for parties interested in inventions to make arrangements with persons who use similar machines or improvements to those claimed by themselves, by which pretended litigation is carried on with a view of accomplishing a particular result. But I think that can hardly be true of the litigation in relation to this part of the sewing machine. And if it has been fair, carried on in good faith, and without collusion, then certainly the result is entitled to great consideration from this court, when the question is brought up here for the first time. So that independently of the view which I am inclined to take from an actual examination of these machines, I am confirmed in the conclusion to which I have come, by the result of this protracted litigation.

The affidavits filed on the part of the defendants, are all substantially the same. The witnesses undertake to specify various particulars in which they claim that the feeding apparatus used in the defendants' machines, materially differs from the invention mentioned in the specifications of Wilson.

It is unnecessary for me to go into a detailed examination of the particulars which are referred to by the various witnesses; such as, that one is the result of the joint action of two or more surfaces and the other is not; that one has not so many parts as the other; that there is a difference in movement, etc.

From what has already been said, the view of the court as to the substantial identity of the feeding apparatus of the machines will be apparent, the principle of the two machines, as it seems to me, being substantially the same, with a variation in form, merely, in one.

A very considerable portion of the argument for the defendants which was pressed upon the court with so much zeal and force, was the serious consequences upon the business of the defendants that would follow the issuing of an injunction That, of course, every court of equity always appreciates. An injunction is the strong arm of equity. It often lays its hand upon a man's business and stops it entirely. It ought never to be granted without full conviction on the part of the court of its urgent necessity.

In this case, it was said by the complainants' counsel, and is apparent from the evidence and from the whole history of the case, that there are parties who sell single-thread machines similar in character and in price to the machines sold by the defendants, who have acknowledged the validity of the Wilson patent, and pay it a tribute by obtaining a license. Now if it be true that Wilson is entitled to these claims of invention as his property, as I think he is, there is an end, as a matter of course, to the alleged hardship. Because, if the defendants are using the complainants' property, they ought not to use it, either in law or in morals, without compensation and without their consent.

So, too, if the proprietors of other single-thread machines pay a license fee to Wilson or to his assignees, for this feeding apparatus, it would not be attended with ruinous consequences to these defendants, more than to other parties, to pay a license fee; so I do not think that the consideration urged is entitled to the weight it would be, if, in point of fact, the injunction were to stop absolutely and in any contingency, the sale of these machines. If it does, it is because the machine is so inferior to the single-thread machines of others in the market that it cannot successfully compete with them when paying a license fee.

Injunction granted.

SELZ vs. UNNA.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1866.

CONTRIBUTION BETWEEN TORT FEASORS.

Where a judgment has been regularly entered against joint defendants, and some have paid their *pro rata*, on a bill filed by others, setting up a secret agreement between themselves and plaintiffs that if they would abandon the defense, plaintiffs would not call upon them for any part of any judgment they might recover, a court of equity will not grant relief. Such an agreement is a fraud upon their co-litigants, and will not be sustained.

Although, generally, contribution cannot be enforced between wrong-doers, still this court will not interfere to assist some of them in escaping such part of the common burden as they are equitably bound to pay.

The marshal having collected part of the judgment from some of the defendants, will be permitted to collect the balance from the others, notwithstanding this secret agreement.

Although the assignee of a judgment takes it subject to all existing equities, yet such an agreement constitutes no defense against an assignee in good faith, without notice.

This case was affirmed by the Supreme Court, in 6 Wallace, 327, in an opinion closely following the reasoning and conclusions of the Circuit Judge, and as the facts are fully stated in the reported case, it is not deemed necessary to publish anything further here.—[*Reporter.*

THE KEOKUK.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM, 1866.

IN ADMIRALTY.

1. LIBEL—IN WHOSE NAME BROUGHT.—A libel may be brought either in the name of the shipper or of an insurance company which has paid the loss or accepted an abandonment.

2. LIABILITY OF CARRIER—NOT DIMINISHED BY SPECIAL RISKS.—The law makes no distinction between common carriers on water. The fact that the navigation of the Mississippi river is attended with special risks and expenses does not diminish the liability of a carrier thereupon.

3. EXCEPTED PERIL—BURDEN UPON CARRIER.—When a loss or damage is shown, the burden is upon the carrier to bring it within the excepted peril. The exception is for his protection, and it is for him to establish it. It is not sufficient simply to show that the vessel was stranded. He must show that it was caused by an unavoidable danger of the river.

The contract of affreightment in this case, was for the transportation of wheat in bulk in the barge Pat Brady, towed by the steamboat Keokuk, from Hastings, Minnesota, to La Crosse on the Mississippi river, to be delivered in good order, "the unavoidable dangers of river and fire only excepted." It is propounded in the libel, that by reason of the unseaworthiness of the boat and barge, and of the decayed condition of the barge, and its utter insufficiency to carry safely wheat in bulk. and the unskillfulness and mismanagement and carelessness of the master, and the neglect of his mariners and servants, the barge was sunk in the river, the wheat was wetted and damaged, and wholly lost.

Libellant, the Home Insurance Company, having issued a policy of insurance on the wheat, was compelled to compensate the shipper for the loss. It is alleged in the libel, and confessed in the answer, that the boat and barge belonged to, and were in the employ of the claimant, John Robson.

It is pleaded in the answer that the barge was tight, staunch and strong, and was well and duly equipped and officered, and in all respects fit to perform the trip, and was sea-worthy, and in good repair and condition; that about eleven o'clock in the evening of the 12th day of May, 1865, in proceeding on her voyage and in her proper place and channel, at Buffalo Slough, near Wineska, the barge struck a hidden, concealed, and unknown snag in the river, causing her to spring a leak and sink within the space of thirty minutes, in four feet of water, and the wheat, or a great portion of it, was damaged. The wheat was delivered up to the agent of the insurance company.

Emmons & Van Dyke, for libellant.

J. W. Cary, for respondent.

MILLER, J.—The objection to this libel, that it is brought by the insurance company, and not by the shipper, is not tenable. Libels may be brought either in the name of the shipper, or by the insurance company having paid the loss, or accepted an abandonment. Under rule 34 in admiralty, the underwriter who has accepted an abandonment, which divests the original claimants of all interest, may be admitted to intervene and become the *dominus litis* in a suit *in rem.*[1]

And by rule 43 of admiralty, the insurance company could come into court by petition, for the avails or proceeds of a decree in favor of the shipper, if the libel had been brought by him in his own name.

It is urged that the strict rule as to the liability of common carriers, should not be applied to those on the Mississippi river on account of the risks and expenses of navigation. The only answer required is, that the law makes no distinction between common carriers on water, as to their liability. They are entrusted with the property of others for a compensation; and for

[1] The Brig Ann C. Pratt, 1 Curtis R. 340; The Propeller Monticello *vs.* Mollison, 17 Howard, 152.

the security of property, they are considered in the light of insurers. It is allowable to carriers exposed to unusual risks and expenses, to charge accordingly. From the bills of lading, exhibited in these suits, it is probable that the officers of the packet company understood this principle.

The alleged cause of the sinking of the barge is that she struck a hidden, concealed and unknown snag. The proof must show satisfactorily that the alleged cause of the accident was unavoidable. It is the claimant's business to establish with reasonable certainty, that it was caused by an unavoidable danger of the river. The exception in the bill of lading was inserted for the carrier's protection, and is to be established by claimant. Where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril, in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception in the bill of lading.[1] And after the damage is established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading.[2]

There is no testimony to sustain the allegation in the answer, that the barge unavoidably struck a concealed and unknown snag; or any reliable proof that she struck a snag at all. The captain did not stop to investigate the cause of the accident, but the boat proceeded on her course at the rate of seven or eight miles an hour.

The boat was towing two loaded barges, in addition to her own cargo, and was running in the night, and in the shade of the surrounding timber, trees and evergreens, at the rate of twelve miles an hour, on the starboard side of the channel.

[1] King *vs.* Shepard, 3 Story, 349; Abbott on Shipping, 478.

[2] Clark *vs.* Bonnell, 12 Howard, 272; Rich *vs.* Lambert, 12 Id., 347; Chitty on Carriers, 242; Story on Bailments, §§528, 529; 3 Kent, 213; 1 Smith's Leading cases, 313; Choteaux *vs.* Leach, 18 Pennsylvania, 233; Flanders on Shipping, §257; Marvin on Wrecks and Salvage, 21; Parson's Maritime Law, 348; Smith's Maritime Law, 386.

The claimant has in no manner brought itself within the exception of the bill of lading. There is no unavoidable danger of the river proven. And it is probable, if a snag had been discovered to have caused the accident, that the position and speed of the boat at the time, would prevent claimant from successfully setting up the plea of unavoidable danger of the river. It seems that the officers of claimant's boats were more intent upon speed than safety.

Decree for libellant.

This case was carried by appeal to the Circuit, and then to the Supreme Court of the United States, and the judgment of the District Court affirmed. Opinion published in Chicago Legal News, May 7, 1870.—[*Reporter*

THE FAVORITE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM, 1866.

IN ADMIRALTY.

1. LIBEL—WHEN TOO LATE.—A libel for loss of goods filed two years and ten months after the loss, and after a *bona fide* assignee of the shipper's bill of lading had seized the boat, cannot be maintained.

2. RELEASE UNDER BOND.—The fact that the boat had been released on bond in the prior suit does not alter the case,—the sureties have a right to look to the boat for their indemnity, and the power of the court over it still continues.

3. LIEN NOT INDEFEASIBLE.—Admiralty or maritime contracts do not create an indefeasible lien on a vessel. A lien created by the shipment and loss of goods vests no absolute, indefeasible interest in the ship or vessel.

4. Courts of admiralty are chancery courts for the seas, and dispose of marine demands against vessels upon principles of equity.

5. DELAY.—Outstanding claims should not be enforced to the embarrassment of commerce, and the prejudice of other creditors and subsequent *bona fide* purchasers.

6. Charges *in rem* must be enforced with reasonable diligence, and delay amounts to a waiver in favor of other creditors.

The Favorite.

This was a libel by Emery D. Chapin and Noah G. Nash against the steamboat Favorite, to recover the value of 420 sacks of wheat shipped by this steamer, but lost in a storm.

The facts appear in the opinion.

E. Mariner, for libellants.

J. W. Cary, for respondent.

MILLER, J.—Prior to the 23d of October, 1862, libellants, were partners, doing business in Milwaukee. D. R. Reynolds had been engaged in business as a dealer in grain, buying in St. Paul, and consigning and shipping to libellants at Milwaukee, transmitting bills of lading, and drawing on them. Being the owner of four hundred and twenty sacks of wheat, of the value of one thousand and seventy-five dollars, on the aforesaid day, at St. Paul, in the State of Minnesota, they made a contract with the captain of the steamboat Favorite, to carry on board from that port to LaCrosse, on the Mississippi river, the said bags of wheat, and there to deliver them to an agent of the LaCrosse and Milwaukee Railroad Company, to be forwarded to libellants in Milwaukee. The wheat was delivered to the captain of the boat, who gave to the shipper bills of lading. Reynolds transmitted one of the bills to libellants, and drew on them for one thousand dollars, which they paid.

The wheat was not put on board the steamer, but on a barge; and the steamer, having the barge in tow, encountered rough weather on Lake Pepin, which caused the barge to sink. The loss was a total loss; and it is alleged that the boat is liable, as the carrier did not, in the bill of lading, reserve the right to lighter, or convey on barges. Subsequent shipments by Reynolds to libellants reduced the balance against him to about eight hundred and seventy-five dollars on the first of November, 1862. The loss occurred on the 27th day of October, of that year, and this libel was brought August 18th, 1865.

It is pleaded in the answer, that the said D. R. Reynolds, in the month of December, 1862, for a valuable consideration, assigned and transferred all his interest in the wheat, and all

his claim of damages for its loss, to J. S. Reynolds, who, in April, 1863, commenced a suit by attachment in his own name, against the steamboat Favorite, in a court of the State of Minnesota, under the laws of that state, and that said cause is pending. The record of that suit shows that the boat had been discharged upon bail, according to the state law.

It is unnecessary to enter upon the subject of libellants' right to bring this libel, as consignees of the wheat, until that matter of the answer is disposed of. This libel is brought upon the bill of lading forwarded to libellants. The attachment suit is founded on the bill retained by the shipper.

The lien created by the shipment and loss of goods, is not in any manner a lien of record, or by possession. Admiralty or marine contracts do not create an indefeasible lien on the ship. Such liens vest no absolute, indefeasible interest in the ship or vessel. There is no statute of limitations in regard to such contracts, nor any fixed time for liens to expire. Demands against boats or vessels should not be delayed, as they may become inequitable. The preferred lien of seamen is not to be delayed after the termination of the voyage on the high seas, unless proceedings against the vessel have been interrupted by her sudden departure, or by some fraud or device. Courts of admiralty are chancery courts for the seas, and dispose of marine demands against vessels upon principles of equity. And it is considered inequitable to enforce outstanding claims, to the embarrassment of commerce, and to the prejudice of other creditors, or subsequent *bona fide* purchasers of vessels. Such claims or demands are charges *in rem*, having priority to contracts on shore, and are to be seasonably enforced, or else great fraud may be worked on the community.[1] Marine contracts become stale and void by omission to enforce them within a reasonable time. Delay amounts to a waiver in favor of other creditors. A claim arising upon a contract of affreightment is not a preferred lien in the admiralty. It is secondary to seamen's wages, or bottomry bonds; hence the greater necessity for prompt proceedings *in rem*. The holder of a bottomry bond, having suffered the ship to make several voyages, with-

[1] See Flanders on Shipping, pages, 340, 341, and note.

out asserting his lien, executions being levied upon the ship by other creditors, loses his lien as against those executions, which were served prior to the monition issued upon the libel brought to enforce the collection of the bond.[1]

Libellants delayed proceedings upon their alleged claim, from October, 1862, to August, 1865,—two years and ten months. There should be no condemnation of the boat, under the circumstances, on this libel, after this long delay—and subsequent shipments between the parties reducing the claim of libellants. This libel is subsequent to the attachment suit, and is not entitled to be preferred on the principle that libellants became first the assignees of the bill of lading upon which they made advances.

It is contended, that the release of the bond from the attachment, by the sheriff upon bail, according to the law of the State of Minnesota, should open the way for the service of the monition in this case. Whether the boat was discharged from all further arrest on the part of plaintiff in the case, or of the sureties to the sheriff's bond, is not to be here determined. Those sureties have a right to look to the boat for their indemnity, and probably they may hold some written security or pledge to that effect.

When the property is delivered on bond, it is too much to contend, that the rights of the court over it can be increased or diminished by that circumstance. Every person so bailing the property is considered as holding it subject to all legal dispositions of the court.[2]

Suffice it, that libellants having delayed proceedings *in rem* for two years and ten months, and until a *bona fide* assignee of the shipper's bill of lading had seized the boat in a lawful proceeding, this libel must be dismissed.

That courts of admiralty, follow the principles of a court of equity, see The Sarah Ann, 2 Sumner, 207; Brown *vs.* Lull, Id., 444.

As to delay in bringing libel on claim, consult 2 Parsons on Shipping and Admiralty, 361; 3 Kent, 196.—[*Reporter.*

[1] Blaine *vs.* The Ship Charles Carter, 4 Cranch, 328.

[2] Rex *vs.* Holland, 4 Tennessee, 457; The Harmony, 1 Gallison, 125; Newell *vs.* Norton and Ship, 3 Wallac, 256–266.

THE NORTHERN BELLE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM, 1866.

IN ADMIRALTY.

1. PERILS OF THE SEA DEFINED.—A loss by perils of the sea or dangers of river navigation, includes only such as are of an extraordinary nature, or arise from irresistible force, or from inevitable accidents, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. In taking two loaded barges in a strong wind around a point where the channel was narrow and the water shallow—but where one barge could have passed in safety,—the carrier is guilty of negligence.

2. DUTY OF CARRIER AS TO VESSEL.—The first duty of a carrier by water is to provide a sea-worthy vesssel, tight and stanch, and suitable in every respect to the particular service in which she may be employed.

3. BARGES—for bulk wheat must be firmly and well built, in the best manner and of the best materials; it is just as necessary that they should be tight, stanch, and strong, as a ship or any other vessel.

4. OPINIONS OF INSURANCE AGENTS OR SHIPPER NO EXCUSE.—Any opinions expressed by agents of the Insurance Company, or by the shipper, form no excuse; the whole responsibility of the sea-worthiness or fitness of the barge rests with the carrier.

This libel was brought for the value of a cargo of wheat, shipped in bulk at Hastings, in Minnesota, on the barge Pat Brady, to be towed by the steamboat Keokuk on the Mississippi river, and delivered at La Crosse, in Wisconsin, in good order, the unavoidable dangers of river and fire only excepted. It is charged in the libel, that the barge was sunk and the wheat damaged, in consequence of the unseaworthiness of the barge, and of the negligence and unskillfulness of the officers and crew of the boat.

The answer of respondent alleges, that the barge was tight, stanch and strong, and sea-worthy, and in every respect fit to perform the voyage; that the wheat was carefully stowed in the barge, which was taken in tow by the boat; that when

opposite Prescott, the wind was so strong, and blew so hard, that it drove the barge on to a bar, so that the barge stranded on the bar; and while so grounded, and in consequence of the strain and injury thereby received, and the violence of the storm, the barge commenced leaking; that the failure to deliver the wheat at La Crosse was the result of unavoidable dangers of river navigation, and not, in any manner, of default of respondent, or of unseaworthiness of the barge. The boat and barge were used in the business of carrying wheat in bulk.

J. H. Van Dyke, for libellant.

J. W. Cary, for respondent.

MILLER, J.—A loss by perils of the sea, or dangers of river navigation, includes such losses only to the cargo as are of an extraordinary nature, or arise from irresistible force, or from inevitable accidents, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. If the loss occurs by a peril which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea or the dangers of the river, as will exempt the carrier from liability, but rather a loss by his gross negligence. A loss from the effects of storms and tempests, in straining the ship, or causing her to spring a leak, or ship a sea whereby damage or injury is done to the goods on board, are losses perfectly attributable to the perils of the sea; although in a mitigated sense, they may be said to be ordinary accidents.[1]

It appears from the evidence that the accident occurred in the daytime, and on a warm day in June. The water was so low that the barges had not over three-fourths of a load. The captain and pilot were well acquainted with the bar at Prescott, and knew that it was at that season one of the most troublesome bars in the river on account of low water, and that the turn around the point was very short. The pilot had never

[1] Story on Bailments, §512, and cases referred to.

met with an accident there. They could have passed in the channel, which was 150 to 200 feet wide, in safety with one barge, and they knew that the wind that was blowing fresh all day, might be stronger at that point. The wind was not a breeze, but enough to make the boat flank some. The wind was not so strong as to require the pilot house to be closed, or to inconvenience the pilot. The accident was not unavoidable. One of the barges should have been taken through at a time. The pilot knew one barge could be taken through safely. He knew the bar, and the course of the wind, and the low stage of water; and with all this knowledge, he backed and attempted to force his heavily loaded boat and two barges through or over the sand bar, at the risk of breaking something. Lines might have been put forward to secure the boat from flanking, and should have been done. If the pilot was running on the starboard side of the channel, as testified by libellant, then he was in fault for not exercising more care and diligence to avoid the accident.[1] The carrier is in the light of an insurer, and must establish the exception in the bill of lading beyond a reasonable doubt. Pressure of the barge against the bar caused her seams to open.

After a thorough examination of the testimony, I am well satisfied that the barge was not of sufficient strength to carry wheat in bulk, safely, particularly at low stages of water. From her age and construction, she was not strong enough to resist the inward pressure of bulk wheat on her sides, and the outward pressure of the tow-boat and a second barge against the sand bar. Carriers on the river of bulk wheat stowed in barges, must have barges well and firmly built, in the best manner and of the best materials. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a sea-worthy vessel, tight and stanch, and suitable in every respect to the particular service in which she may be employed. It is just as necessary that a barge employed in carrying wheat in bulk, should be tight,

[1] The Louisiana, 3 Wallace, 164—173—174.

stanch and strong, as a ship, or any other vessel. The cargo is liable to damage by wet; and by shifting and settling it presses hard on the walls of the barge. The barge Pat Brady does not come up to the requirements of the law. She was old and slightly built, with knuckles instead of knees. But five weeks prior to the accident in question, by being pressed against something when in tow of the steamboat Keokuk, the seams of this barge opened, and her butts sprung as in this case. Repairs were made on her by putting in some new timbers, but she still remained an old and weak barge, liable to give way at any time. Witnesses who examined her after the repairs, testify that portions of her timbers were entirely decayed. It is quite certain that the barge was not of sufficient strength to resist an effort to plough through a sand bar, or the pressure of short turns on a bar, for the sake of speed, as appears to be the practice of the officers of claimant.

It was the duty of the carrier to see to the sufficiency of the barge. Any opinions expressed upon that subject by agents of the insurance company, or by the shipper, form no excuse. The whole responsibility of the sea-worthiness or fitness of the barge, rests with the carrier, and he is responsible for defects in it. Upon a casual view, the barge may have been thought nearly as good as new after the repairs, but at the same time she is proven to be old and rotten. Claimant has failed to sustain the answer, either as to the sea-worthiness of the barge, or the exception of dangers of the river, and the decree must be for libellant.

This case was carried by appeal to the Circuit Court, and then to the Supreme Court of the United States, and the opinion of the latter court affirming the judgment of the District Court is published in 9 Wallace, 526.

As to carrier's duty in providing a sea-worthy vessel, see Lyon *vs.* 928 Barrels of Salt, Volume 2 of these Reports and cases there cited.

The clause "except the perils or dangers of the rivers or lakes" considered, McArthur *vs.* Sears, 21 Wendell, 190.

Dangers of navigation and perils of the sea defined, 1 Parsons on Shipping and Admiralty, 253; 3 Kent, 216, and cases there cited.—[*Reporter.*

SCHENCK vs. SUPERVISORS OF MARSHALL COUNTY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1866.

MUNICIPAL BONDS.

1. County bonds in all respects regularly issued by the Board of Supervisors, except that the notice of the election, at which the authority to issue the bonds was given, proceeded from the County Court, instead of the Board of Supervisors, but on which the county had paid interest for nine years, are valid in the hands of *bona fide* holders.

2. The election having been held in due form, there is simply a defective execution of the power, and not a defect in the power itself.

3. On questions of commercial law this court. although respecting the opinions of the Supreme Court of the State, is not bound by its decisions.

4. A municipal corporation may be estopped by its own acts, as well as a private individual.

5. The Board of Supervisors being authorized under certain circumstances to issue bonds, and having issued them, the presumption is that they were issued conformably to the authority, and the Board is estopped from denying their validity in the hands of a *bona fide* holder.

This was an action of assumpsit by Robert C. Schenck, to recover interest due on coupons attached to bonds, issued by the Board of Supervisors of Marshall county, upon their subscription to the capital stock of the Western Air Line Railroad Company. The defense was, that on February 28, 1853, when the election was held to decide as to whether the county should subscribe to the stock of the said corporation; the county was acting under township organization. That the notice for the election proceeded from the County Court, instead of the Board of Supervisors, and that as the bonds were issued by the Board, without any further authority, they were void. The county subscribed, and the bonds were issued by the Chairman of the Board, properly authenticated by the county seal.

Scammon, McCagg & Fuller, for plaintiff,

Arguing that the defect in the notice, all the subsequent proceedings being regular, did not invalidate the bonds in the hands of *bona fide* purchasers, cited *The Commissioners of Knox County vs. Aspinwall, et al.*, 21 Howard, 539; *Woods vs. Lawrence County*, 1 Black, 386; *Moran et al. vs. The Commissioners of Miami County*, 2 Black, 722; *Gelpcke et al. vs. The City of Dubuque*, 1 Wallace, 175; *Van Hostrup vs. Madison City*, 1 Wallace, 291; *Meyer vs. The City of Muscatine*, 1 Wallace, 384; *Thompson vs. Lee County*, 3 Wallace, 327; *Rogers vs. Burlington*, 3 Wallace, 654.

As to ratification and estoppel by payment of interest,

The President, &c. of the Town of Keithsburg vs. Frick, 34 Illinois, 405; *Society for Savings vs. The City of New London*, 29 Connetcicut, 174; *Tash et al. vs. Adams*, 10 Cushing, 252; *The State of Ohio on Relation of Garrett et al. vs. Van Horne*, 7 Ohio State Reports, 327; *The State of Ohio on the Relation of Smead et al. vs. The Trustees of Union Township*, 8 Ohio State Reports, 394; *The Trustees of Goshen Township vs. Shoemaker et al.*, 12 Ohio State Reports, 624; *Gould vs. The Town of Venice*, 29 Barbour, 443; *The Farmers' and Mechanics' Bank of Kent County vs. The Butchers' and Drovers' Bank*, 16 New York, 125; *Clarke vs. City of Janesville*, 10 Wisconsin, 136; *Mills vs. Gleason*, 11 Wisconsin, 470.

That the United States courts will not always follow the decisions of the local courts, *City of Chicago, vs. Robbins*, 2 Black, 418; *Gelpcke vs. City of Dubuque*, 1 Wallace, 175.

That not every irregularity invalidates the bonds in the hands of *bona fide* holders, *Taylor vs. Taylor*, 10 Minnesota, 107; *Commissioners of Knox County vs. Wallace*, 21 Howard, 539; *Zabriskie vs. Cleveland C. & C. Railroad Company*, 23 Howard, 381.

B. C. Cook, for defendant.

DRUMMOND, J.—In this case, where the demurrer was

argued yesterday, the question raised upon the demurrer substantially disposes of the case. The law of 1849, it was contended, was changed by subsequent acts, throwing upon the Board of Supervisors what had previously been done by the county court; and inasmuch as the notice of the election was given by the county judge and not by the Board of Supervisors, it is claimed that the bonds which were issued to the railroad under an election, by the Board of Supervisors, were void. This identical question in relation to the bonds of Marshall county, (similar bonds), has been before the Supreme Court of this state, and that court has ruled that inasmuch as the notice was improperly given, the bonds were void in the hands of *bona fide* purchasers for value. There can be no other argument, we think, made in favor of the defendant in this case than what arises from this decision. The question is, whether that decision is binding upon this court in a case of this kind. We have examined the opinion of the Supreme Court of this state, upon this point, and, as I have already said, it decides the same question that is involved here, and decides it against the validity of the bonds. We think, with all proper respect, that decision of the Supreme Court of the state cannot be sustained upon principle, nor under the authority of decisions of the Supreme Court of the United States. With all due respect to the Supreme Court of this state, we think that it is, to all intents and purposes, simply a defective execution of the power, and not a defect in the power itself. These bonds were issued by the Board of Supervisors of Marshall county. By law they were authorized to issue them, when the notice was given, and the election was held. The notice was something that had to precede the issuing of the bonds, but it is said came from the wrong source. It ought to have come from the Board of Supervisors instead of from the county court. It was simply a notice of the election. The election was held in due form, the vote was taken, and in all other respects the law was complied with. If the law had said in words that all bonds issued without a compliance in every particular with the pre-requisites of the law, should be held void under all circum-

stances, perhaps there would be some force in the position taken by the Supreme Court of the state, but the law simply declares, before the bonds shall be issued, this notice shall be given. The authority to issue the bonds is the Board of Supervisors. In a case that was very fully considered by the Supreme Court of the United States, it was held that the presumption was, that when a particular board (in that case a Board of County Commissioners) was authorized, under certain circumstances, to issue bonds upon notice, when the bonds were issued, the presumption was that the pre-requisites of the law had been complied with, and that when the bonds were in the hands of an innocent purchaser the county should be held responsible, although, in point of fact, one of the pre-requisites of the case had not been complied with. This is a commercial question. It is a question affecting a citizen of another state, in relation to commercial paper. We think that the decision that has been cited strikes at the very foundation of nearly all the bonds that have been issued under this or similar laws, because it is very rare indeed, where the law requires certain officers to perform acts, that every thing essential is performed precisely in the form that the law requires. We have to look at the great object sought to be accomplished by these and similar laws. We think that when the material pre-requisites of the law have been complied with, and the bonds have been issued in conformity with the main features and provisions of the law, and the money has been obtained on them by the county, and they have been transferred in open market to *bona fide* holders for value, that the county ought to be held responsible. Again, in this case, after these bonds had been issued by the Board of Supervisors, who, it will be recollected, it is contended, should have given the notice, taxes were assessed to pay the interest upon these bonds, year after year, and the agents of the county participated in the election of officers of the railroad to which these bonds were issued as a subscription to its stock. The taxes were assessed and paid by the county for the interest on these bonds for about six years. The only ground which can be

taken in this aspect of the case, as it seems to us, is to hold that a municipal corporation, like a county, cannot be estopped by its own acts in relation to a bond about which there has been some informality in the issue. That question has been, as we think, decided by the Supreme Court of the United States, and that court held that a municipal corporation may be bound, as well as an individual, by its own acts; and admitting there was a question as to the validity of the issue of these bonds, we think it is too late for the county of Marshall to raise that question, after they have, for a series of years, in this way, ratified and confirmed their issue. The statute the Supreme Court of the state has construed, adopting the principles of the common law. This court construes it according to the same principle, and we think, construing it in conformity with those principles, we can arrive at no other result than that which has already been stated. It is painful for us to come in conflict on a question of so much importance as this with the Supreme Court of the state, but we think such great principles are involved in this decision that we do not feel inclined to yield our own individual opinions, the more especially as the case can be reviewed by the Supreme Court of the United States.

The demurrer will be overruled and judgment will go for the plaintiff on the demurrer.

Davis, J. concurred in above opinion.

This case was carried to the Supreme Court, and all the facts are fully stated in the reported case, 5 Wallace, 772, where the judgment of the court below is affirmed.

The decision of the Supreme Court of Illinois, declaring these laws invalid, is in the case of Marshall County *vs.* Cook, 38 Illinois, 44.

That a corporation is bound by an estoppel is declared in New England Car Spring Company *vs.* Union India Rubber Company, 4 Blatchford, 1.

A municipal corporation, Bissel *vs.* City of Jeffersonville, 24 Howard, 287; Mercer County *vs.* Hacket, 1 Wallace, 83.

Municipal corporation estopped from denying validity of bonds. Moran *vs.* Miami County, 2 Black 722; Mercer County *vs.* Hacket, 1 Wallace, 83; Van Hostrup *vs.* Madison City, Ibid, 291; Meyer *vs.* Muscatine, Ibid, 384;

Mygatt *vs.* City of Green Bay, Volume 1 of this series, p. 8; Luling *vs.* City of Racine, Id. 314, See also Woodhull *vs.* Beaver County, 3 Wallace, Jr., 188.

United States courts not always bound to follow the decisions of state courts. Swift *vs.* Tyson, 16 Peters, 18; Pease *vs.* Peck, 18 Howard, 595; Robinson *vs.* Commonwealth Insurance Company, 3 Sumner, 221; Williams *vs.* Suffolk Insurance Company, Id. 270; Thomas *vs.* Hatch, Id. 170; Meade *vs.* Beale, Taney, 339; Carroll *vs.* Carroll's Lessee, 16 Howard, 275.

See also Gudgeon *vs.* Supervisors of Manitowoc County, June Term, 1870, and to be published in a future volume of these Reports.

That the payment of interest on bonds is an affirmance of their validity, was also held by Miller, J. in case of Luling *vs.* City of Racine, Volume 1 of this Series p. 8.

That the doctrine of estoppel applies to corporations, as to matters within the scope of their powers, though no actions be found in their records, see Hooker *vs.* Bank of Rochester, 30 New York, 83; Howe *vs.* Keeler, 27 Connecticut, 538; Hart *vs.* Stone, 30 Connecticut, 94; Argenti *vs.* San Francisco 16 California, 255.

Mere irregularities do not vitiate a bond in the hands of a *bona fide* holder Butz *vs.* Muscatine, 8 Wallace, 575; Mercer County *vs.* Hackett, 1 Wallace 83; Butler *vs.* Dunham, 27 Illinois, 474; Commissioners, &c. *vs.* Nichols, 14 Ohio State Reports, 260.

Consult also Town of Grand Chute *vs.* Winegar, decided by the Supreme Court at the December Term. 1872, reported in Chicago Legal News, April 12, 1872.

A ratification by the legislature of bonds issued by a municipal corporation under a statute is, in all respects, equivalent to original authority, and cures any defects of power or irregularities in its exercise. Beloit *vs.* Morgan, 7 Wallace, 619; City of Kenosha *vs.* Lawson, 9 do. 477.—[*Reporter.*

COOPER vs. LABER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1866.

SECURITIES GIVEN TO RAILROADS TO AID IN CONSTRUCTION.

1. BONA FIDE HOLDERS MAY ENFORCE.—A note given to a Railroad Company as subscription for stock, may be enforced by a *bona fide* holder, notwithstanding existing agreements or equities between defendant and the company.

2. COLLATERAL AGREEMENT.—An agreement made by the company at the time of the giving of the note, and as a part of the same transaction, that it would save defendant harmless on his subscription, does not constitute a valid defense unless the plaintiff can be charged with notice.

3. REPRESENTATIONS.—The fact that the plaintiff knew for what the note and an accompanying mortgage were given, makes no difference; nor do any false or fraudulent representations made to induce defendant to execute the note, unless notice of them is brought home to the plaintiff.

4. INFORMAL INDORSEMENT CURED.—The plaintiff having received the note and mortgage attached to, and as collateral security for a bond of the company, containing a clause that the note and mortgage were assigned and transferred "in connection with the bond and not otherwise," but without any written indorsement, any informality in such transfer is cured by the written indorsement of the note made before maturity by the President with the knowledge and consent of the Board of Directors.

5. MAKER MUST RESPOND TO INNOCENT HOLDER.—The rule of law that the defendant having executed the note and enabled the company to raise money on it, must respond to an innocent holder, is well established and founded on the plainest principles of justice and equity.

This was an action by the indorsee of a promissory note given by the defendant on the 6th day of May, 1856, for the sum of thirty-seven hundred dollars, to the Racine and Mississippi Railroad Company, and payable with ten per cent. interest, at the office of the company, in Racine, Wisconsin, on the 10th day of May, 1861.

The facts further appear in the opinion.

Lewis Umlauf, for plaintiff.

Knowlton & De Wolf, for defendant.

DRUMMOND, J., charged the jury as follows:

It is necessary that you should understand clearly the circumstances under which this note was given. By acts of the Legislatures of Wisconsin and of Illinois, certain corporations were authorized to construct a railroad from Racine, partly through Wisconsin and partly through Illinois to the Mississippi river at Savannah, and to consolidate those roads with each other, so as to make one continuous line of road. Articles of association were entered into to accomplish that purpose. After this was done, the company sought to raise money by obtaining subscriptions to the stock of the road from different parties along the line, and took from them notes similar in character to the one that is in evidence here, and to secure their payment mortgages were given on real estate. Accordingly, to secure the payment of this note, the defendant executed a mortgage on his farm. At the time this note and mortgage were given, the Racine and Mississippi Railroad Company entered into an agreement with the defendant to the effect that, in consideration that the defendant assigned to the company his right to any dividends that he might be entitled to on his stock, the company would save him harmless from the payment of interest and from any loss whatever for his subscription to the stock. On the 29th day of May, 1856, the railroad company executed a bond, with coupons attached and in June of that year this bond, together with the note and mortgage, were assigned to the plaintiff, he paying the amount of the note. The bond recited that the company was indebted to the bearer in the sum of thirty-seven hundred dollars, payable at their office, in the city of New York, on the 10th of May, 1861, with interest from and after the 10th of May, 1856, at the rate of ten per cent., payable semi-annually, and that as security for the same it assigned and transferred to the holder of the bond the note and mortgage of the defendant. The

note unindorsed, the mortgage and bond, were fastened together and delivered to the plaintiff's son and agent, Fletcher Cooper, at the time the money was paid. There is evidence tending to show that certain representations were made at the time by parties who procured the note and mortgage from the defendant, and which it is said caused him to execute them, and there has been also a good deal of evidence introduced, the object of which, on the part of the defendant, is to show that these representations were untrue, and therefore it is claimed the defendant was not bound to pay the note and mortgage. The only remark the court desires to make in relation to that is this: It is necessary for you to distinguish between statements made by way of expressing an opinion or a simple recommendation, and those made by the parties with a view of inducing the defendant to execute the note. A mere expression of opinion, or a recommendation in relation to certain things should, of course, be regarded merely as the judgment of the party. A statement of the facts which the defendant would not be presumed to know, and had not the means of knowing, with a view of inducing him to execute the note, would be different.

The court will leave it to you to determine whether there were representations made as facts to the defendant, with a view to induce him to execute the note and mortgage, which were false. If you should find that these statements were made, and were untrue, the next question would be whether they would affect the plaintiff.

It was in June, 1856, that the note and mortgage were transferred to the plaintiff. You have to take the state of facts as they existed at that time, in order to ascertain the *bona fide* character of the assignment; whatever might occur afterwards could not affect the plaintiff. It is made a question how far the facts at the time bound the plaintiff. There can be no doubt, from the evidence in the case, that the plaintiff knew for what the note and mortgage were given; that they were given as a subscription for so many shares of the capital stock of the company. The main question is, whether the plaintiff

knew of the existence of the representations alleged to be made, at the time, or prior to the execution of the note, and also knew that they were untrue. Is there evidence in the case that tends to show that the plaintiff or his son, Fletcher Cooper, at the time the bond, note, and mortgage were taken, knew, or had reason to know, that there were any false or fraudulent representations made to the defendant to induce him to execute them? If there is not any such evidence in the case, then, according to the view which the court takes, the plaintiff would be as to that a *bona fide* holder of the note and mortgage, and would not be bound by any equities which might exist between the railroad company and the defendant.

The defendant's counsel has contended that the note and mortgage were invalid, for the reason that the articles of consolidation were void; that there was in reality no foundation in law for the note and mortgage to rest upon; and some authorities have been cited on this point. I have not had as much time as I would desire to consider this question. The main ground upon which he puts it, as I understand, is, that those articles of association between the different corporations were not under seal, and therefore the union of the roads in the two states was illegal. So far as I am at present advised, I am inclined to think, considering the manner in which this question arises, so far as the authority was concerned on the part of the railroad company to receive this note and mortgage, we must treat them as a valid note and mortgage.

I have spoken of the alleged misrepresentations that were made at the time, and of the necessity of the plaintiff or his agent knowing that these misrepresentations were made, before that part of the defense can be made out. I will now particularly call your attention to the fact that at the time the note and mortgage were given, the railroad company entered into a written agreement with the defendant. There is no doubt that the note and mortgage, and the agreement, were all one transaction. The question is, was the plaintiff, at the time of the transfer to him, aware of that agreement? Did he know the nature and contents of that contract? If he did, then he

was bound by it, not otherwise. You will see that the agreement, by its terms, seems to contemplate that the note and mortgage were to be transferred, because in the case of transfer the company guarantees the defendant against loss. The view that I take of it is that, unless the plaintiff or his son, as agent, knew of the existence of this agreement made by the company, he is not bound by it.

The only remaining question is whether there was an indorsement or assignment of the note to the plaintiff. The evidence shows that the Racine and Mississippi Railroad Company appointed agents to negotiate the loan of these notes and mortgages, and by virtue of the authority so given, as I understand, this and similar bonds were executed by the company, which were secured collaterally, as in this case, by notes and mortgages. As I have stated, the note was not indorsed by the company. By the terms of the bond, they transferred and assigned the note; but there is a clause in the bond that declares that the note and mortgage were assigned and transferred in connection with the bond—"in connection with the bond, and not otherwise." So that I think it is quite clear that it was the intention of the company that the bond, the note, and the mortgage, should all go together, forming one security to the holder or bearer. They were all attached together, and transferred at the same time to the plaintiff.

There may be a question whether this was not legally a good indorsement of the note by the payees, the Racine and Mississippi Railroad Company. It is true the indorsement was not written on the back of the note, but it was written upon a paper which was attached to it, and which it was intended should become a part of it. However that may be, there was a written indorsement afterward, and years before its maturity, made upon the note by the president of the company to the plaintiff. Some question has been made whether this indorsement was authorized. You have heard the testimony of Mr. Durand, the president, on that subject. There is no doubt that it was the intention of the company to transfer whatever right of property it had in the note to the plaintiff, at the time

that the money was received and the negotiation consummated. Therefore, the written indorsement upon the note, which was subsequently made, was only carrying out the intention of the parties at the time. He says that it was the subject of conversation in the Board of Directors; that indorsements were made by him from time to time in the presence and with the knowledge of the Board; and he gives the reason why. It was supposed that under the law of Illinois a written indorsement of a note was necessary. It was thought, he says, by the Board, that no additional authority was necessary in order to enable him to make the indorsement, and it was made accordingly. If you believe this, then I think there is no doubt that there was a valid technical indorsement made on the note, because if his statement is true, it was done with the knowledge and consent of the Board of Directors, and in fact it would have been a breach of faith for the Board of Directors to withhold the indorsement from the note, if that were necessary, because they had transferred the note for which they had received value in cash, and it was right that they should give to the plaintiff all the power and control over the note which they themselves had.

You will perceive, therefore, that according to the view which the court takes in this case, the plaintiff was a *bona fide* holder of the note, and can recover, if he did not know that there were any false or fraudulent representations made at the time, or previous to its execution, and which caused its execution, and if he did not know of the existence of the contract or agreement given by the railroad company at the time that it was executed, and if he paid value for it. The reason of this is apparent. It is said to be a hard case for the defendant, as the stock has become worthless, that he should pay his money for nothing. That may be true, but the question is, who should suffer a loss in a case like this? Admitting that he has been imposed upon, and as between the original parties themselves he ought not to pay it, still if he or the plaintiff has to suffer, the rule is that by executing the note and enabling the company to put it in circulation and raise money on it, the

defendant must suffer the loss, for if he had never executed the note, or caused it to be put in circulation, the plaintiff never would have advanced his money on it. That is the reason of the rule of law on the subject, and it is founded, it seems to me, on the plainest principles of justice and equity.

Therefore you will see that the case turns, so far as you are concerned, upon this, viz: whether there is any evidence in the case which shows that the plaintiff knew that there were misrepresentations made (if there were misrepresentations of the character that I have stated.) and whether the plaintiff knew of the existence of the agreement that was made at the time by the railroad. If he did not, and if there was no fact brought to his knowledge which would cause a prudent man to make inquiry, then I think that the plaintiff is entitled to recover. If, however, he knew of the existence of any fraud.—if he knew of this contract and its terms—then he is not a *bona fide* purchaser without notice, but he takes the note and mortgage subject to the equities which exist between the parties, and the defendant would not be liable. The other questions raised by the defendant I shall reserve for future consideration, if it becomes necessary. If you shall find for the plaintiff, of course he is entitled to recover the amount of the note with interest from the last payment, which was the 10th day of May, 1857.

Verdict for plaintiff.

This case was carried by writ of error to the Supreme Court and the judgment below affirmed, the position and reasoning of Judge Drummond being adopted as the views of the Supreme Court. 7 Wallace, 565.

A *bona fide* holder of bonds may enforce them, independent of any equities between the original parties. Morris Canal and Banking Company *vs.* Fisher, 1 Stockton, 667; Finnegan *vs.* Lee, 18 Howard Practice Reports, 186; Bank of Rome *vs.* Village of Rome, 19 New York, 20.

To the same effect, see State of Illinois *vs.* Delafield, 8 Paige, 527; on appeal, 2 Hill, 159; Mechanics' Bank *vs.* New Haven R. R. Company, 3 Kernan, 625; cited and approved in Bank of Rome *vs.* Village of Rome, 14 New York, 20.

That fraudulent representations, made at the time of subscription do not constitute a good defense, see opinion of Hopkins, J., in Upton, assignee, *vs.* Hansbrough, February, 1873, to appear in subsequent Volume of these Reports.—[*Reporter.*

WOODMAN vs. THE KILBOURN MANUFACTURING COMPANY.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—JANUARY TERM, 1867.

IN EQUITY.

OBSTRUCTIONS IN A RIVER.

1. STATE CONTROL OVER ITS RIVERS.—The General Government not having legislated or acted on the navigation of the Wisconsin river, the control of the State Legislature is unrestricted.

2. The Legislature of a new state has the same jurisdiction and control over its waters, as have any of the original states.

3. It is the province of the Legislature to inquire into the navigability of a stream and the uses to which its surplus water may be applied.

4. POWER OF LEGISLATURE IN REGARD TO CONSTRUCTING DAM.—An act authorizing the construction of a dam, is in the nature of a public grant of the use of the surplus water of the river, for the improvement and development of the country, and the Legislature has the power to enquire into the necessity for such a structure, and to prescribe the conditions and plans upon which it may be made.

5. INJUNCTION NOT GRANTED ON THEORETICAL OPINIONS.—This court will not grant an injunction upon the theory that the dam cannot be constructed as contemplated, without obstructing the navigable use of the river. Mere theoretical opinions are not sufficient in law for enjoining the progress of a work in the nature of a public improvement, authorized by a legislative act.

Application for a preliminary injunction.

It is alleged in the bill, that the Wisconsin is one of the navigable rivers leading into the Mississippi river, and a common highway, free to be navigated and used as such by complainant and all other citizens of the United States; that said river is navigable from its source to its mouth, and capable of being used for rafting and for driving lumber, and also for steamboat navigation; and that it runs through a district of pine lands lying above the town of Newport; that the owners of

said lands, including complainant, annually raft down said river large quantities of lumber and logs to sawmills and to market; and that they are dependent upon the unobstructed use of the river in this employment. The bill further charges that in 1859, a dam was constructed in said river at the town of Newport, by a chartered company, for hydraulic purposes, which being an obstruction to navigation was partly removed; and that the company defendant is building a dam at the same place, using a portion of the old dam; and that this company is doing so under color or in pursuance of an act of the state legislature, entitled "an act to aid in the development of manufacturing interests in this state, approved April 10, 1866, as follows: "The Kilbourn Manufacturing Company, whenever organized in pursuance of any law of this state, shall have power, and said company is hereby authorized to complete the water power in sections three, four, nine and ten in township thirteen, north of range six east, in the counties of Columbia and Sauk, by raising the dam a sufficient height for that purpose, not exceeding three feet above the usual low water mark, in the Wisconsin river, and so forming the same that rafts of lumber can pass safely and conveniently without hindrance or delay." The bill then charges that it is physically impossible to build a dam at that point, the town of Newport, in such form as that rafts of lumber can pass safely or conveniently, or without hindrance or delay; and that such dam would wholly obstruct the navigation of the river by steamboats and other vessels; and will entirely obstruct navigation up stream; and that the structure, as at present toward completion has obstructed free passage to rafts, and caused to the owners thereof delay and damage. It is further charged, that the act authorizing the construction of the dam is contrary to the ordinance of 1787, the Constitution and laws of the United States, and of this state.

Defendants Anderson and Kilbourn are alleged to be agents of the company defendant in the work of building the dam.

The bill prays an injunction restraining defendants from further proceeding in the building of the dam; and that at

the final hearing the dam may be decreed to be abated as a common nuisance.

I. Holmes, for complainant cited: *Davis vs. The Mayor &c., of New York*, 14 New York, 526; 2 Story's Equity Jurisprudence, §927; *Trustees of Watertown and White vs. Cowen and Bagg*, 4 Paige's Chancery, 510; *Corning et al. vs. Lowerre*, 6 Johnson's Chancery, 439; *Brown vs. Chadbourne*, 31 Maine, 9; *Moore vs. Sanborn*, 2 Gibbs, 519; *Morgan vs. King*, 35 New York, 454.

G. W. Lakin, also for complainant cited: *City of Georgetown vs. Alexandria Canal Company*, 12 Peters, 94; *Crowley vs. Tinkler*, 19 Vesey, 617; *Irwin vs. Dixon*, 9 Howard, 25; 2 Story's Equity Jurisprudence, §§921-2-3-4; 9 United States Statutes at Large, 83, land grant to improve Fox and Wisconsin rivers.

Act of Wisconsin, Session Laws 1846, page 16, accepting the grant; Act of same session, page 58, to provide for the improvement, &c.; Memorial of Legislature of Wisconsin Territory approved January 20, 1846, to Congress; Session Laws of 1846, page 229; Memorial of Legislature of Wisconsin to Congress, approved December 18, 1843; Appendix to Session of Laws of 1844; Article 4, of ordinance of 1786; Laws of 1839 of Wisconsin Territory, page 18; Article 9, §1 of the Constitution of Wisconsin incorporating the same provision in the same language. Revised Statutes of Wisconsin 1858, Chapter 1, §1, enacts the same.

State of Pennsylvania vs. Wheeling Bridge Company, 9 Howard, 647, etc.; 13 Howard, 518. *The Hine vs. Trevor*, 4 Wallace, 555, asserts the broad doctrine that the principles of admiralty jurisdiction, as conferred on the federal courts by the Constitution, extend wherever ships float and navigation successfully aids commerce, whether internal or external; *The Moses Taylor*, 4 Wallace, 411; *The Genesee Chief*, 12 Howard, 457; *Jackson vs. Steamboat Magnolia*, 20 Howard, 296.

Finches, Lynde & Miller, for defendants.

MILLER, J.—Affidavits read on the part of complainant sustain the charges in the bill in regard to the obstruction of navigation by the proposed dam. Those on part of defendants, state that the dam will be an improvement to navigation at that point. It does not satisfactorily appear that the river above the site of the dam is navigable for steamboats employed in the ordinary business of commerce. It is conceded that rafts of logs and lumber can be floated down stream from several miles above the dam.

The ordinance of the Confederate Congress, for the government of the territory of the United States, northwest of the river Ohio, adopted July 13, 1787, created a temporary government; and also contained six articles, "to be considered as articles of compact between the original states and the people and states in said territory, and forever remain unalterable, unless by common consent." After the adoption of the Constitution of the United States, an act of Congress, passed August 7, 1789, (1 United States Statutes at Large, 50,) continued the ordinance in force, and modified it in conformity to the conditions of the Constitution, so far as it related to the temporary government of the territory.

That portion of the ordinance referred to in the bill is, "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." The Constitution of the United States subsequently adopted, contains the provision that "new states may be admitted by the Congress into this Union," which implies that new states shall be admitted into the Union on an equality with the original states. The ordinance directs, that the territory may be divided into not less than three nor more than five states; but the territory has been divided into six states, including that portion of Minnesota east of the Mississippi river. The ordinance further directs, that in case of a division into five states, one boundary

shall be an east and west line, drawn through the southerly bend or extreme of Lake Michigan; which we know to have been entirely disregarded by Congress in the acts admitting new states. If the ordinance were obligatory in every particular, and not altered by common consent, nor superseded by the Constitution of the United States, the states embraced within the north-western territory could not have been admitted into the Union on an equality with the other states, which is a fundamental principle of the Constitution, the basis of this Union. Each new state presented its constitution to the consideration of Congress, with its application for admission into the Union, under the Federal Constitution. Congress, composed of members from the original states, approved the constitution of the new state thus presented, and passed an act for its admission into the Union. By the act of Congress admitting the new state upon its application, the several articles of the compact were not merely altered by the common consent required in the ordinance, but were superseded. "Whatever may have been the force acceded to the ordinance at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the Constitution of the United States from the time of its adoption."[1] It therefore follows that the act of the legislature authorizing the construction of the dam in question, is not prohibited by the ordinance.

The General Government, under the constitutional power of Congress "to regulate commerce among the several states," has done no act prohibiting or interfering with this state in regulating the navigation of the Wisconsin river. No act of Congress has been passed upon the subject of commerce on that river, which includes navigation; nor have boats or vessels been licensed, nor ports of entry established on said river by federal authority. The Wisconsin river being a domestic stream, rising, running and emptying into the Mississippi river, within the state, local legislation is unrestricted by federal au-

[1] Pollard's Lessee *vs.* Hagan, 3 Howard, 212; Parmoli *vs.* The First Municipality of New Orleans, 3 Howard, 589; Strader *vs.* Graham, 10 Howard, 82; Dred Scott *vs.* Sandford, 19 Howard, 393–490–91–92.

thority, unless it is in conflict with the navigation laws, or some other enactments of Congress. In the absence of action on the part of the United States in regard to the navigation of the river, as a stream bearing a necessary relation to commerce among the several states, the power of the legislature under the state constitution, to pass the act authorizing the construction of the dam in question, is the next subject for consideration.

The Wisconsin river is a meandered stream according to the government survey of public lands. Although it is not navigable in its unimproved condition above the site of the dam for steamboats navigating the Mississippi river, yet it is navigable in the common sense of the term. The soil or bed of the river is not granted to riparian purchasers *usque ad filum*, but the body of the stream is reserved to the public. The river is therefore open and free to all persons, for purposes of navigation; not as a personal right, but subject to Governmental authority. The right to unobstructed navigation of the river is to be regarded a clear and undoubted right, paramount to every other use of the water. It is an inherent paramount right of the people, but not exclusive of a partial obstruction or inconsiderable detention, by a dam constructed in pursuance of Governmental authority for the development of the country, for the accommodation of public necessities, or of commerce, or travel upon land. Partial diminution of the navigability of a stream for these purposes, unless restrained by the superior legislation or authority of the General Government, has been the established power of the states since the formation of the Government. In the case of *Wilson vs. The Black Bird Creek Marsh Company*, 2 Peters, 245, it appears that the creek was a navigable stream flowing into the Delaware river; and that the legislature of the state of Delaware passed an act empowering the company to build a dam in said creek, for the purpose of excluding the water from the surrounding marsh, and thereby enhance the value of property on its banks, and probably improve the health of the inhabitants. The dam was a total obstruction of navigation. The court decid-

ed that the measure authorized by the act stops a navigable stream and must be supposed to abridge the rights of those accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of the State of Delaware and its citizens. In *Martin vs. Waddle*, 16 Peters, 410, the court say: "When the revolution took place, the people of each state became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights surrendered by the Constitution of the General Government." The admission of the new states into the Union on an equality with the original states gives them the same absolute rights, notwithstanding the title to the soil was originally in the United States.[1] It cannot be claimed that complainant, a citizen of the State of Massachusetts, has a right to the navigation or use of the Wisconsin river, superior to that of the inhabitants of this state. By the Federal Constitution "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

It is claimed on the part of complainant, that the act authorizing the construction of the dam in question is repugnant to the provision in article nine of the state constitution that, "the navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same, shall be common highways and forever free as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor." This article is incorporated in the Constitution from the ordinance of 1787. The navigable waters, such as the Wisconsin river, running into the Mississippi river shall be common highways; and their navigation to the extent of their navigable capacity cannot be materially obstructed. Such rivers may be considered navi-

[1] Pollard's Lessee *vs.* Hagan, 3 Howard, 212. See also Gibbon *vs.* Ogden, 9 Wheaton, 1; Pennsylvania *vs.* The Wheeling, &c., Bridge Company, 13 Howard, 518, and 18 Howard, 421, 430, 432; Gilman *vs.* Philadelphia, 3 Wallace, 713, and the opinion of Justice Grier in the Passaic Bridges, 3 Wallace, 782.

gable waters without any such constitutional provision, as Congress has the power to regulate commerce between the states, which includes the navigation of navigable streams. The paramount right of navigation being in the people, who may wish to use a navigable stream, any obstruction however inconsiderable without constitutional legislative authority is a nuisance, to be abated at the suit of an individual, or of the state. This principle is prescribed in a general law of the state, "that all rivers, and streams of water in this state in all places, where the same have been meandered and returned as navigable by the surveyors employed by the United States Government, be declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same without the permission of the legislature." This law establishes, by statute, the inherent common law right of the legislature to investigate and ascertain the extent of the navigability of streams, and of the kind of proposed partial obstructions to navigation for the general convenience and use of the people. In the case of the Blackbird Creek in the state of Delaware, navigation was totally obstructed by the dam built in pursuance of a legislative act; but whether such an obstruction could be built in one of the navigable streams of Wisconsin, this case does not require a decision. It is very clear that neither in Delaware nor in Wisconsin can even a partial obstruction be made without governmental authority. The legislature has the power to inquire into the necessity for a structure, such as a bridge or dam over, or in a navigable stream, and to prescribe the conditions and plans upon which the proposed improvement may be made. It is also the province of the legislature to inquire into the navigability of a stream, and the uses to which surplus water may be applied. The navigability of the stream is the subject of proof. The return of the surveyors, showing a stream to have been meandered is not conclusive.[1] That case announced the principle, that the effect of the statute is not to declare that meandered streams are navigable in fact, so as to dispense with proof of

[1] Jones *vs.* Pettibone, 2 Wisconsin, 308.

their navigability, when the fact is to be established, but only that they shall be regarded as navigable to such an extent that no obstruction shall be placed in them without the consent of the legislature. The statute declares that the legislature possesses the exclusive power to direct and control the municipal policy of the state in regard to improvements, and partial obstructions of navigable streams. The constitutional provision is a declaration of a principle inherent in a sovereign state of the Union, and the statute is notice of such power.

It is not for an individual, but for the state, to decide whether the whole of a public highway is necessary for the public accommodation; hence any partial obstruction of any navigable stream or highway, or of any portion of it, without legislative authority is a nuisance. The public have a right to the use of the entire highway; and no citizen can appropriate a portion, upon the principle that enough remains for public use. The legislature is to judge of that. The act authorizing the construction of the dam in question is in the nature of a public grant of the use of surplus water of the river, for the improvement and development of the country, and for the accommodation of the people in the vicinity. In making this grant, the legislature probably were influenced by the consideration, that the man who builds a mill or manufactory in a new country is a public benefactor.[1] Several acts have been passed by the state legislature, from time to time, authorizing the construction of dams in meandered rivers, upon such plans, or in such forms, that rafts of lumber can pass safely and conveniently without hindrance or delay. Such acts were also passed by the territorial legislature, while the ordinance was considered in force in the territory. I have come to the conclusion, that the act authorizing the construction of the dam in question is within the constitutional power of the legislature.

The bill complains of a prospective abridgement of com-

[1] See The People *vs.* The City of St. Louis, 5 Gilman, 351; Hart *vs.* The Mayor, &c., of Albany, 9 Wendell, 571; Flanagan *vs.* The City of Philadelphia, 42 Pennsylvania State, 219.

plainant's right to the free navigation of the river. He has not been injured by the dam at present in process of construction. Defendants must be allowed a reasonable time to construct the dam, not exceeding three feet in height above low water mark, and in such form as rafts of lumber can pass safely and conveniently without hindrance or delay, according to the act. The work cannot be restrained by injunction upon the theory that no dam can be constructed at that point that will not obstruct the navigable use of the river. The legislature have authorized defendants to make the experiment, if a dam can be constructed as required by the act, and the court will permit the practical test to be applied. If the speculations of complainant's bill should be realized, and defendant's efforts prove unsuccessful, the dam will have to be abated at their cost. Mere theoretical opinions are not sufficient in law for enjoining the progress of a work in the nature of a public improvement authorized by a legislative act.

If the dam shall be constructed according to the requirements of the act, the paramount right of those navigating the river with rafts of lumber is satisfied. They cannot complain if the dam should detain their rafts a few minutes, or should require caution in passing through or over it. The only question on final hearing will be whether the dam not exceeding three feet above low water mark, is so constructed, that with proper care and caution, "rafts of lumber can pass safely and conveniently without hindrance or delay." Since the year 1838 a dam with a lock for ascending and descending trade has stood in the Fox river, at Depere in this state. The time required for passing the lock is no hindrance or delay. In the year 1840 a bill was brought before me as territorial judge to restrain the erection of a bridge over the Milwaukee river, at Milwaukee, which is at that place an arm of the lake, navigable for all classes of boats and vessels. Being satisfied that the bridge was to be built with a draw, which could be opened and closed in fifteen or twenty minutes, I considered that the interests of commerce must submit to an inconsiderable delay or inconvenience for the accommodation and necessity of the

people, and dismissed the bill. Since that day bridges with draws have been constructed in pursuance of legislative acts, over almost every river in the land. Dams, too, are built by the same authority in navigable streams, with locks or sluices, for the accommodation of the whole people.

The preliminary injunction prayed for will not be granted.

At the September Term, 1868, this case came on for final hearing, upon the pleadings and proofs, before Justice Davis and District Judge Miller, and the bill was dismissed.

As to enjoining a public work, see case of Hartford Fire Insurance Company *vs.* City of Chicago, in subsequent Volume of these Reports and cases there referred to.

The United States may enjoin a work of internal improvement conducted by state authority, if it interferes with improvements on navigable waters made by authority of Congress. In such case the power of the Federal Government is exclusive. United States *vs.* Duluth, 10 American Law Register, (N. S.) 449.

See also State of Pennsylvania *vs.* Wheeling & Belmont Bridge Company, 18 Howard, 421; Conway *et al. vs* Taylor's Executor, 1 Black, 603; Mississippi & Missouri Railroad Company *vs.* Ward, 2 Black, 485; Gilman *vs.* Philadelphia, 3 Wallace, 713.—[*Reporter.*

THE LADY FRANKLIN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY TERM, 1867.

IN ADMIRALTY.

1. LIEN ON DOMESTIC VESSEL.—Where ordinary supplies are furnished to a vessel running upon the lakes, upon application of the master, no inquiry being made as to the credit of the master or owner, no maritime lien is created, even though they were charged directly to the vessel, and it was taken for granted that they constituted such a lien.

2. To sustain such a lien, a case of maritime necessity for a credit upon the vessel must be established.

3. Maritime liens are not allowed to those furnishing a vessel with her usual supplies on her regular trips, and at her usual ports of entry and discharge.

This was a libel filed by Lyons and Finney for supplies, materials and repairs furnished to the propeller Lady Franklin in the summer of 1864, at Oswego, New York. The propeller was being run by one Kirkland, who held the same under an agreement of purchase with A. E. Goodrich, which had been only in part fulfilled, and in the following year she reverted to Goodrich, the claimant in these proceedings.

Kirkland resided in Sheboygan, Wisconsin, and Goodrich in Chicago. The vessel was registered in Chicago. Kirkland was running the propeller under a charter party with the Grand Trunk Railway Company of Canada, from the port of Toronto, in Canada, to the port of Oswego, New York, making two or three regular trips each week, and carrying freight and passengers. The charter-party was for a specified sum each trip, the vessel to pay her own expenses. A part of the charter money was received by the captain, but the greater part was collected by Kirkland. The libellants knew that Kirkland was running the vessel, but it does not appear that they knew the terms of his charter-party. The supplies and

repairs in question were charged directly to the vessel, it seeming to have been taken for granted that they constituted a lien upon the vessel, but no express agreement to hypothecate the vessel for their payment was made. The original understanding upon which the supplies were furnished, and about which there is no dispute, was thus stated in the evidence of the master: that on or about the 9th of July, he applied to Lyons & Finney for credit, saying to them that he had got things for the boat, for which the boat owed them, and he would pay as soon as the boat earned the money. Lyons said he would wait till the boat came back, until she had made a trip. He did not apply to them for credit upon the personal responsibility of the owner or himself, and the bills were for ordinary supplies furnished while the propeller was making her regular trips. It was admitted that the supplies furnished were such as were proper, usual and necessary for such a vessel in the business in which she was then engaged, and included various needful repairs made to her, both in dry dock and otherwise during the season. It was claimed by the libellants that neither the said Kirkland, nor the master of the vessel had any personal credit at Oswego, and that the materials and repairs furnished could not have been obtained upon the personal credit of either at that place. There was no evidence as to the personal responsibility of Kirkland. All that appeared in evidence upon this point was that Lyons & Finney had no knowledge of his having any credit in Oswego or elsewhere, but it did not appear that any inquiry was made as to his responsibility, or any attempt made to procure the supplies or repairs upon the credit of Kirkland. Nor did it appear that Kirkland was notified that these parties were furnishing supplies on an express or implied hypothecation of the vessel as their security, or that any attempt was made to communicate with him upon the subject. He was in Oswego several times during the summer.

The claimant, Goodrich, objected that upon the above state of facts no maritime lien was created which could be enforced against the propeller in his hands.

H. F. Waite and *Robert Rae*, for libellants.

Goodwin & Larned, for respondents.

DAVIS, J.—This case is within the principle of the decision of *Pratt vs. Reed*, 19 Howard, 359. I understand that case to decide that in order to a valid maritime lien upon a vessel for supplies and repairs, it must appear not only that such repairs and supplies were needful to the vessel when furnished, but that the existence of some unforeseen and unexpected emergency, making it necessary to procure such supplies and repairs at such time upon the credit of the vessel, must also be shown; and that the circumstances under which such supplies and repairs are furnished, must be such as would, under the maritime law, have justified and sustained the giving at such time a bottomry bond, for the same repairs and supplies; the only difference being that, in the case of the giving a bottomry bond, it must further appear that there was a necessity for paying the extraordinary interest incident to that security. It was further ruled in that case, "that the supplies having been furnished at a fixed place according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel,—there could be no unexpected or unforeseen exigency to require it; and that for aught that appeared, the supplies could have been procured on the personal credit of the owner."

Applying to this case the principles of the above decision, in which I entirely concur, the claim of the libellants cannot be sustained.

There is nothing in the case which establishes such a case of maritime necessity for a credit upon the vessel as would alone sustain the lien which the libel seeks to maintain. There was no unexpected or unforeseen emergency. The vessel was in her regular course of business, at one of her established ports of arrival and departure. She was running between Toronto and Oswego, upon a charter-party with the Grand

Trunk Railway, and Oswego was one of her regular ports for procuring the usual and needful repairs and supplies which were required by her from time to time upon the successive trips performed by her. It is obvious that proper provision should be made by those who were running her to meet such running expenses. The freight money earned upon the charter should have supplied her with sufficient funds for that purpose.

To allow vessels to be subject to secret maritime liens to those furnishing her with her usual supplies on her regular trips, and at her usual ports of entry and discharge upon such trips, would be injurious to the best interests of commerce. If this were to be permitted, the interests of the parties having mortgages upon vessels, and of owners letting vessels upon charters, would be greatly jeopardized, and the vessel practically could be run at their cost.

In addition to the absence in this case of any evidence of any such unforeseen and unexpected emergency as would justify a maritime lien upon the vessels for the repairs and supplies furnished, even in a case where it satisfactorily appeared that the owner of the vessel had no personal credit in the port of supply, the proof in this case fails to furnish sufficient evidence of the inability to procure such supplies and repairs upon the credit of the owner. It is not sufficient to show that the parties furnishing such supplies did not know that the owner had a credit. They are bound to proper and reasonable diligence in making inquiries as to such credit, and the inability to obtain such supplies, upon such credit, ought to appear by showing proper efforts so to obtain them.

In this case, the supplies and repairs were charged at once to the vessel. No inquiries were made as to the owner's responsibility, nor does it appear that the owner was without credit at the port of supply. It appears that the vessel was run upon a charter, and was to receive so much for each trip, and that these earnings were received by the master and owner, and these facts would rather furnish ground for the presumption that they had the means either to pay for the needed supplies, or to obtain a personal credit for the amount of them;

and as no attempt was made by communicating with the owner, or otherwise, to raise the needed amount in this way, the language of the Supreme Court, in *Pratt vs. Reed*, may be appropriately applied to this case: that, "for aught that appears, the supplies could have been procured on the personal credit of the owner."

Libel dismissed.

This claim was one of a number filed at the same time and submitted to Judge Drummond, who ruled that, in his opinion, they constituted, under the general maritime law, valid liens upon the vessel, but doubted whether, under the rulings of the Supreme Court in Pratt *vs.* Reed, they could be sustained, and suggested that the case be heard before Justice Davis, and his judgment be entered in each case as the judgment of the District Court, which was done, and the above opinion rendered.

In the case of The Grapeshot, 9 Wallace, 129; the Supreme Court go into an extended discussion of the doctrine of maritime liens for repairs and supplies, and sum up the doctrine of maritime hypothecation in the following propositions:

1st. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed upon due inquiry and credible representation, to be necessary.

2nd. Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit.

3d. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them or to provide funds for the cost of them on the security of the ship.

4th. The ordering by the master of supplies or repairs upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith.

5th. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, and, if the fact of necessity be left unproved, evidence is also required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

See also Thomas *et al. vs.* Osborn, 19 Howard, 22; The James Guy, 5 Blatchford, 496; The Sea Lark, 1 Sprague, 571; The Sarah Starr, Id., 453; The Eledona, 2 Benedict, 31; The Washington Irving, Id., 318; The John Lowe, Id., 394.

For cases on hypothecation, see Bee's Reports, 4, 102, 131, 250, 339, 345, 348; 353.

The Ben Flint.

In a case lately decided in the district of Oregon, The Augusta, November, 1872, reported in 5 American Law Times Reports, 495, Deady, J., holds that under Rule 12, in admiralty, as amended, May 6, 1872, a material-man has, by the general maritime law, a lien upon the ship which may be enforced in admiralty, whether the ship be domestic or foreign, or whether in a home or foreign port; in Wickes *vs.* The Circassian, Id., 483, November, 1872, Blatchford, J., ruled that this amendment to the rule did not apply to supplies furnished previous to May 6th, before which time necessaries furnished to a vessel in her home port did not constitute a lien under the maritime law.

Consult also The Celestine, Volume 1 of this Series, page 1. The Selt, October Term, 1872, to appear in subsequent Volume of this Series.—[*Reporter.*

THE BEN FLINT.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—FEBRUARY TERM, 1867.

IN ADMIRALTY.

1. SAILORS ENTITLED TO MEDICAL CARE.—Sailors on the lakes are merchant seamen, and are entitled, in a proper case, to be cured at the expense of the vessel, if taken sick, or hurt without their fault, while in the service of the vessel.

2. VESSEL NOT ALWAYS LIABLE.—When a sailor takes advantage of the rate of wages, before shipping on a short voyage on the lakes, and receives a hurt on entering the port of discharge, without any fault or neglect of the officers, and he takes his discharge and his full pay, and afterwards contracts a debt for medicine, etc., the vessel is not liable, the officers of the vessel not having neglected him after the injury.

3. ADMIRALTY HAS JURISDICTION.—The Court in Admiralty has jurisdiction to enforce by libel the payment of the expenses of curing a sick seaman on the voyage. They are in the nature of additional wages.

4. Numerous authorities cited and commented on.

5. NEGLIGENCE.—What constitutes negligence by officers or seamen.

This schooner was employed in transporting lumber from ports on Lake Michigan, in the State of Michigan, to the port of Chicago, in the State of Illinois. Libellant was a seaman on board during the summer of 1866, but contracted before departure on each voyage at the rate of the then current wages.

In the month of September he shipped on board, at Chicago, as seaman for the round trip, from there to Manistee, in Michigan, and back, at the rate of two dollars and fifty cents per day. The vessel was freighted at Manistee with lumber in the hold and on deck, leaving a passage way to and from either side forward of the mainmast and cabin. The lumber near the mainmast being stowed about four and a half feet above deck, the main-boom was brought up to an elevation above the lumber of about eighteen inches, and supported by blocks placed on the saddle, and resting against the mainmast. These blocks or false saddles were known to all on board not to be fastened to the mainmast, and that the boom was so elevated solely for the purpose of managing the vessel. The vessel being about to enter the harbor at Chicago on her return trip, the wind blowing fresh, an order was given by the officer in command to take in the mainsail, which extended over the starboard side. When the order was given, libellant and two other seamen who were standing on the larboard side of the vessel forward, immediately proceeded to that duty. One of the seamen about three feet from the mainmast crawled through the space between the lumber and the boom, and libellant following was hurt by the boom dropping across his back. The third seaman proceeded along the passage way. The wind blowing fresh at the time caused the boom to drop, although it was secured in the usual way from shifting. The vessel moored at her dock in Chicago, when the officers desired libellant to go to the marine hospital in that city, but he preferred to leave for his home in Milwaukee. They paid him his full wages, and one day extra, and assisted him to the cars for Milwaukee. The hurt rendered libellant unfit for duty for several days, requiring medicine and medical advice, nursing and attendance in Milwaukee, to recover for which this libel is brought. Libellant was not an experienced seaman on board a sailing vessel but was obedient and dutiful.

Stark & McMullen, for libellant.

Emmons & Van Dyke, for respondent.

MILLER, J.—It is contended that the officers of the vessel had neglected their duty in not fastening to the mainmast the blocks upon which the boom rested. This, I think, is not tenable. The blocks were placed against the mainmast in the usual manner, known to all on board, merely for the temporary support of the boom. The object of the elevation of the boom and the existence of the passage-way were equally well known. If no passage-way had existed, or if libellant had been required or ordered to pass under the boom, in either case the vessel would be in fault in not securing the blocks, or the boom from dropping. I do not think the vessel was in fault in this respect.

It is scarcely necessary to prove by authorities, that a seaman having received an injury, or taken sick whilst in the service of the ship, without his fault, is to be cured, or rather, cared for, at the expense of the ship. This rule is very ancient, and is universally recognized. Sound policy in favor of commerce, to induce seamen to ship for long voyages, and to perform laborious and hazardous duties on board, and also intrinsic equity sanction the rule. The rule is beneficial to the owner, whilst he may deem it onerous. It encourages seamen to ship on lower wages, diminishes temptation to plunder, and encourages them in the discharge of duty; and the master will be watchful of their health, and careful of their exposure to disease and accidents. The right to claim for such expenses or such duty on the part of the ship or vessel in contemplation of law, is a part of the contract for wages, and a material ingredient in the compensation for the labor and services of the seaman. And in the admiralty a remedy may be applied on the principle of additional wages; and in case of neglect or injuries of the seaman on the part of the ship's officers, it may be extended beyond the time of shipment, or the return of the vessel to her home port. The services of a seaman are maritime, and whatever enters into the compensation for such services and is reducible to money, is in equity decreed as a just remuneration for such services.

This ancient and now universal maritime rule is as applica-

ble to seamen or mariners on the lakes and on rivers flowing into the ocean, as on the high seas. Seamen or mariners on board boats or vessels employed in navigable fresh waters within the admiralty jurisdiction of the United States, are merchant seamen and are entitled to all rights and subject to all duties as such. But upon the equitable principle of the maritime law, the same consideration under the rule may not be extended indiscriminately to all classes of seamen. Humanity and the interests of commerce demand a liberal extension of the rule toward seamen on vessels employed in foreign trade. But the same liberality need not be extended to a seaman shipping for a voyage of a few days on the lakes, particularly when additional wages are demanded at the commencement of each voyage.

It appears that libellant demanded increased wages before shipping for each voyage as the season advanced. And he knew that a marine hospital existed in Chicago, where seamen are cared for after discharge from service, and where the officers of the vessel wished him to go. It is true that libellant was not obliged to enter the marine hospital as a patient.

Claimant's advocate contends that libellant was in fault, for passing over the lumber and under the boom, and cannot, therefore, sustain his libel.

To entitle a sailor to sustain a libel for care and attendance required in case of sickness or personal injury while in the service of the vessel, the disability must have occurred without his fault. Libellant testifies that he took the course over the lumber to save time; but he had better have said that he thoughtlessly followed the lead of a reckless brother sailor. Sailors are wards of the admiralty, and are rather excused than condemned for accidental mistakes, while in the faithful and obedient discharge of duty. Even after punishment for willful disobedience, if they return to duty, their full wages in many cases are allowed. A strict rule of forfeiture should not be applied to a sailor. What may be negligence or fault in persons employed in service on land, may not be in sailors on board of vessels. Ordinary negligence consistent with entire good

faith, as in this instance, should not prejudice a sailor's just right. The maritime law rather overlooks ordinary negligence, but punishes those gross faults and vices which affect or prejudice the ship's service or discipline. The accident occurred to libellant while in the prompt discharge of duty in obedience to a proper command. The dropping of the boom was unforeseen, and not caused by him. Under such circumstances, I do not think libellant was in fault. To forfeit a claim for care or attendance under the rule, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct, as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty.[1]

The following cases will explain the principle upon which relief has been allowed sick and disabled seamen. In *Harden vs. Gordon*, 2 Mason, 541, the rule is elaborately discussed, and the court came to the conclusion that the expense of curing a sick seaman in the course of the voyage is a charge on the ship, and in this case charges are included not only for medicines and medical advice, but nursing, diet and lodging, if the seaman be carried ashore; that the court of admiralty has jurisdiction to enforce the payment of these expenses, by a libel, for they are in the nature of additional wages during sickness, and that no stipulation contrary to the maritime law to the injury of seamen will be allowed to stand unless an adequate additional compensation is given to them. In the case of *The Brig George*, 1 Sumner, 151, the mate took sick during a foreign voyage and was put on shore, where expenses were incurred for medicines, medical advice, and attendance, it was adjudged that the ship owner should be held liable. In the case of *The Nimrod*, Ware 1, a suit for mariner's wages, no deduction was allowed for expenses attending libellant's sickness during the voyage. So also in *The Forrest* Id., 420, where the expenses attending the sickness of a seaman during

[1] Walton *vs.* The Ship Neptune, 1 Peters, 142; Reed *vs.* Canfield, 1 Sumner, 195; Johnson *vs.* Huckins, 1 Sprague, 67; Pierce *vs.* Patton, Gilpin, 435; The Nimrod, War

the voyage exceeded the balance of his wages. And in *Freeman vs. Baker*, 1 Blatchford & Howland, 372, it is decided, that a promise of a seaman, sick in a foreign port during the voyage, to pay bills for his medicines, &c., is void and does not release the ship of liability.[1]

The following cases extend the benefit of the rule beyond the time of service of the seaman, as limited by the shipping articles, but it will be observed that misconduct on the part of the officers of the vessel formed an essential ingredient in each case. In *Reed vs. Canfield*, 1 Sumner, 195, the ship Albion having been employed in a whaling voyage on the Pacific came to anchor in the harbor of New Bedford, her home port. The master soon after landing, gave permission to one of the mates also to go on shore. Both of the mates expressed a desire to avail themselves of this permission, on the return of the boat from landing the master. They both concluded to go on shore, taking with them a boat's crew.

The ship being left without officers to enforce discipline, the boat's crew, including libellant, remained on shore after landing the mates, until a storm ensued, which rendered the passage of the boat from shore to the vessel tedious. The libellant's feet were so frozen that they had to be amputated. The disability to libellant would not have happened but for the unwarrantable departure of the officers from their duty. In *Brown vs. Overton*, Sprague, 462, libellant, a seaman on board the ship Madison, in a voyage from Calcutta to Boston, while reefing a topsail was thrown from the yard by the sudden motion of the sail and violence of the wind, and broke both of his legs. The master, with the aid of a passenger and one of the crew, set the bones, and secured them in bandages and splints as well as they could. Libellant was placed in a hammock, and continued lying in it until four days after the arrival of the ship at Boston, without proper attention, when he was removed to a hospital. He was decreed indemnity for all he

[1] The William Harris, Ware, 367; Brunent *vs.* Taber, Sprague, 243; Ringgold *vs.* Crocker, 1 Abbott's Admiralty Reports, 344; The Atlantic, Id., 452; Walton *vs.* The Ship Neptune, 1 Peter's Admiralty, 142, note.

had suffered from the omission of the master to go into St. Helena, the nearest port after the accident, for surgical aid, and the master's culpable neglect of him during the voyage and after arriving at Boston, including expenses incurred after leaving the ship. In the case of *Choucher vs. Oakman*, 3 Allen, 185, at law, the plaintiff was allowed to recover for damages from the unlawful act of the master in wounding and then discharging him in a foreign port, while employed in the prosecution of a voyage. The plaintiff was allowed for necessary expenses at the foreign port, and for his return, months after the time mentioned in the shipping articles. And in *Moseley vs. Scott*, 14 American Law Register, 599, at law, plaintiff shipped on board a steamboat as cabin-boy, for a trip to Nashville and back to Cincinnati. During the voyage he became sick with the small pox to such a degree that he was not able to attend to his duty, and was compelled to take to his bed on board, where he remained until the return of the boat. The master and officers of the boat during his confinement on board neglected to furnish him with sufficient medicine, medical advice, attendance, nursing and diet necessary for his comfort and cure. By reason of such neglect plaintiff's feet were frozen so that they had to be amputated, which confined him in an hospital for several months. A demurrer to the petition, according to the practice in Ohio was overruled. See also *Nevitt vs. Clarke*, Olcott, 316, where the ship in a foreign voyage was sold to foreigners without arrangements being made for the return of a sick seaman.

These are all the American cases that I have had access to. In the first class, misconduct or neglect of the officers of the vessel was not material. In the second class, their misconduct and neglect towards the seaman became an important item for the consideration of the court. Upon every principle of humanity and equity owners of vessels should be held liable, in amount measured by the actual loss to the seaman for his sickness or disability caused or aggravated by the misconduct or neglect of their officers.

From this review of American cases I have arrived at the

conclusion, that, in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for a disabled or sick seaman should only be co-extensive in duration to that of the seaman to the vessel. The privileges and liabilities of the parties are, in contemplation of law, measured by the shipping articles. Interests of commerce do not require that the privileges and duties of ship owners and seamen should be extended beyond the reason, nature and terms of the shipping contract, unless for fault, misconduct, or neglect on the part of officers of vessels toward their seamen; or, perhaps, when the removal of a sick or disabled seaman from the vessel, or a change of treatment then being practiced might prejudice his recovery within a reasonable time. Humanity and equity might require indulgence in extreme cases. Libellant received the hurt complained of without fault on the part of the officers of the vessel while coming into the port of discharge, and after his discharge and receipt of his wages he traveled by land about ninety miles to the city of Milwaukee. The officers of the vessel did not neglect him after the injury.

The libellant cannot recover against the vessel for expenses incurred by him in this city, and his libel must be dismissed.

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24. MEASURE OF DAMAGES.—If the city has been guilty of negligence, and in consequence a vessel has been obliged to cut her way out of the ice, the damages would be, 1st, the necessary expense incurred; 2d, reasonable damages for the delay; 3d, the damages actually sustained by the vessel. But no damages can be given for injuries sustained in doing anything not warranted by skill and prudence. *Ib.*

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ADMIRALTY (*Continued*).

The fact that the shippers gave an order to the warehousemen for the cargo, and then settled with them on the faith of the bill of lading, does not take the case out of the general rule. *Ib.*

36. PERILS OF THE SEA DEFINED.—A loss by perils of the sea or dangers of river navigation includes only such as are of an extraordinary nature, or arise from irresistible force, or from inevitable accidents, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. In taking two loaded barges in a strong wind around a point where the channel was narrow and the water shallow, but where one barge could have passed in safety, the carrier is guilty of negligence. *The Northern Belle*, 529.

37. DUTY OF CARRIER AS TO VESSEL.—The first duty of a carrier by water is to provide a sea-worthy vessel, tight and staunch, and suitable in every respect to the particular service in which she may be employed. *Ib.*

38. BARGES—for bulk wheat must be firmly and well built, in the best manner and of the best materials; it is just as necessary that they should be tight, stanch, and strong as a ship or any other vessel. *Ib.*

39. OPINIONS OF INSURANCE AGENTS OR SHIPPER NO EXCUSE.—Any opinions expressed by agents of the Insurance Company, or by the shipper, form no excuse, the whole responsibility of the sea-worthiness or fitness of the barge rests with the carrier. *Ib.*

40. IN CHICAGO RIVER, WHAT TOO HEAVY A TOW.—In a stream as narrow and crowded as the Chicago river, a tow of nine loaded canal boats is, under ordinary circumstances, too heavy for a tug; and although the tow is almost exclusively under the control of the tug, if the latter, being the agent of the boats, is overtasked, the boats must answer for the fault. *The Palmetto*, 140.

41. DUTY OF MOVING VESSELS.—It is the imperative duty of all craft navigating the river, to avoid coming in contact with vessels moored to the wharf, and in case of collision, the presumption is that the former is in fault, and if they from carelessness, negligence, or want of skill, collide with a moored vessel, contributory fault of the stationary vessel does not excuse them. *Ib.*

42. ANCHOR—WHERE PROPER PLACE.—A vessel lying at the wharf must have her anchor out of the way of passing vessels. If she allows it to hang at the hawse pipe, with the flukes below the surface of the water, where it sinks a colliding boat, she is in fault. She is also in fault for not dropping it on the approach of a vessel. *Ib.*

Though such a position of the anchor may meet the requirements of the city ordinances, it does not meet the demands of maritime law. *Ib.*

43. CITY ORDINANCES concerning vessels are binding only as police regulations: beyond this they have no force in the United States Courts. This court will allow them to be read, determining for itself their application to the subject matter. *Ib.*

44. EXCEPTIONS.—There are exceptions to the general rules of navigation, for which no regulations can be provided. *The Pilot*, 159.

ADMIRALTY (*Continued*).

Under such circumstances, each vessel should be managed with care and skill, to avoid a collision, and if there be a failure to do this, though a vessel be within the rule, she can claim no damages for injuries received. *Ib.*

A strict adherence to the rule, which necessarily leads to a collision, affords no excuse to a vessel. *Ib.*

45. STEAMER MEETING SAIL VESSEL.—A steamer is required to give way to a sail vessel; yet, if she cannot do so without peril, the sail vessel must avoid her. It is no objection to the jurisdiction, that the sail vessel was less than twenty tons burden, nor that the collision was near the Canada shore. *Ib.*

46. ANSWER.—WHEN SUFFICIENT.—An answer which sets up facts constituting negligence is sufficient, though no fault be formally charged. The rules of pleading in admiralty are less technical than at law. *Ib.*

47. WHEN SAILING VESSEL SHOULD CHANGE HER COURSE.—The master of a steamer has a right to expect that an approaching sail vessel will change her course if she can do so without risk, and any other course will involve danger of collision. *Ib.*

No sail vessel which recklessly attempts to cross the line of a steamer when there is no necessity for doing so, and when the steamer could not give way without encountering peril, can be entitled to recover for an injury received. *Ib.*

48. GENERAL AVERAGE.—The court in admiralty will not entertain jurisdiction in cases of general average, unless all the parties in interest are before it. *The Congress*, 42.

49. CLAIM FOR CONTRIBUTION ONLY A QUALIFIED LIEN.—A lien created by the maritime law, as salvage, etc., is absolute and unconditional; but a claim for contribution is but a qualified lien, depending upon the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee. *Ib.*

The maritime law does not imply on the part of the owner receiving the goods a promise for contribution. *Ib.*

50. WHAT CONSTITUTES A CASE FOR GENERAL AVERAGE.—To constitute a case for general average, three things must concur: A danger in which ship, cargo, and crew all participate,—imminent and apparently inevitable, except by voluntarily incurring the loss of a portion to save the remainder; a voluntary jettison of some portion for the purpose of avoiding this common imminent peril; this attempt to avoid the imminent common peril must be successful. *Ib.*

51. A vessel propelled in whole or in part by steam, is not liable to a penalty for transporting goods, wares, and merchandise, without inspection of the hull and boilers under the act of Congress of August 30th, 1852. The penalty is alone for transporting passengers. *The Propeller Sun*, 373.

52. Answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts. *Ib.*

ADMIRALTY (*Continued*).

53. A steamboat employed in transporting passengers between ports in the same state is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852, and the District Court has no jurisdiction. *The Seneca*, 371.

54. BARGES SUBJECT TO RULES OF NAVIGATION.—The use of barges having been found indispensable to a profitable navigation of the Ohio and Mississippi rivers in certain stages of the water, they are subject to the rules of navigation. *The Dick Keyes*, 408.
When the articles transported are the same, governed by the same transporting power, whether steam, wind, or the natural forces of the current, the rules of navigation apply respectively to the modes used. *Ib.*
Goods, whether conveyed in the body of a steamboat or in a barge attached thereto, are subject to the same guaranties and protection. There is nothing in the addition of a barge connected with a steamboat which changes the character of transportation. *Ib.*

55. A contract for the use of a barge at a stipulated rate, is cognizable in admiralty, and a libel may be maintained against the steamboat using it.
The parties having intended to bind the steamer, the court will not restrict the meaning of the words used in the contract, as they tend to the advancement of commerce. *Ib.*

ADMINISTRATORS.—*See* EXECUTORS AND ADMINISTRATORS.

ANCHOR.

1. WHERE PROPER PLACE.—A vessel lying at the wharf must have her anchor out of the way of passing vessels. If she allows it to hang at the hawse pipe, with the flukes below the surface of the water, where it sinks a colliding boat, she is in fault. She is also in fault for not dropping it on the approach of a vessel. *The Palmetto*, 140.

2. Though such a position of the anchor may meet the requirements of the city ordinances, it does not meet the demands of maritime law. *Ib.*

3. A vessel, approaching a bend in a narrow and crowded river, should have her anchor where it can be let go at once. *The B. S. Sheppard*, 221.

ANSWER.—*See* PLEADING, 2, 3.

ASSIGNEE IN BANKRUPTCY,—*See* BANKRUPTCY.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment with preferences, made by two members of a firm, in the absence and without the knowledge or consent of the third, who had previously refused to give preference to any creditors, is not valid as to him. *Bowen vs. Clark*, 128.

2. He having rupudiated the assignment, and with the aid of his partners and a mortgagee of a portion of the property regained possession of it, this court will not entertain a bill by preferred creditors to compel re-delivery to the assignee. *Ib.*

3. Although in Wisconsin a mortgage of a retail stock, not duly filed, nor accompanied with delivery of possession, is void as to creditors, a bill by preferred creditors against the mortgagors and the mortgagee, who is

ASSIGNMENT FOR BENEFIT OF CREDITORS (*Continued*).

equally preferred, will not lie unless the mortgagee claims payment in full to their prejudice. *Ib.*

4. Where the principal assigning partner was, at the time of the execution of the assignment, laboring under the immediate effects of intoxication, well known to the assignee and the agent of the creditors procuring the assignment, the transaction will not be favored in a court of equity. *Ib.*

ASSIGNMENT OF PATENTS.—*See* PATENTS, 2, 3.

ATTACHMENT.

1. JURISDICTION.—Where the defendant is a citizen of Illinois, and the plaintiff a citizen of another state, and an attachment writ is served upon property, and defendant personally served with process, this court can take cognizance of the case. *North vs. McDonald*, 57.
2. WHAT CONSTITUTES CONCEALMENT.—A man who leaves a place to avoid service of process, requesting false information to be given of his movements "conceals himself so that process cannot be served upon him" within the meaning of the attachment law of Illinois. *Ib.*
3. Circumstances authorizing the issuing of an attachment stated. *Ib.*
4. No ISSUING OF PROCESS NECESSARY.—It is not necessary that process should be first issued, or that an attempt should be made by an officer to find him. It is sufficient if he so conceal himself that an attempt to serve process would be useless. *Ib.*
5. The concealment may be at a distance as truly as where he resides, and if it turn out that he was in another county, it is no objection that process was not issued to that county. *Ib.*

ATTACHMENT OF BOATS AND VESSELS.—*See* ADMIRALTY.

ATTORNEY.—*See* PRINCIPAL AND AGENT.

AUDITOR'S DEED.

1. An auditor's deed is *prima facie* good, and is a title deducible of record within the meaning of section 11, chapter 66, Revised Statutes of Illinois. *Mattison vs. Walker*, 62.
2. When coupled with seven years' possession and payment of taxes, it is sufficient to protect a party who can connect himself with it. *Ib.*

BAGGAGE.—*See* COMMON CARRIER, 1-5.

BAILMENT.—*See* COMMON CARRIER.

BANKING.

1. INDIANA BANKING ACT—WHEN STOCKHOLDERS MAY BE SUED.—Under the act of the legislature of Indiana, of May 28, 1852, "to authorize and regulate the business of general banking," and the act of March, 1855, amendatory thereto, no suit can be maintained against a stockholder in any such bank in his individual character for the payment of any portion of the regular notes issued by such bank and protested for non-payment, until it is shown that the stocks deposited with the auditor of state, to secure the redemption of the circulation are first exhausted, or that the bank is insolvent. *Toucey vs. Bowen*, 81.

BANKING (*Continued*).

2. AUTHORITY OF CASHIER.—The cashier of a bank, as such, has no authority in another state to settle an account, taking private notes and drafts, and giving a receipt in full. In order to bind the bank, his power must be in the nature of an appointment as agent. *Sandy River Bank vs. Merchants', &c. Bank*, 146.
3. His is a limited authority, and parties claiming a discharge otherwise than by payment must show his authority. *Ib.*

BANKRUPTCY.

1. DECREE OF FORECLOSURE AGAINST BANKRUPT DOES NOT EXTINGUISH EQUITY OF REDEMPTION.—A decree of foreclosure against a man who had been duly adjudicated a bankrupt, his assignee not having been made a party, is insufficient to extinguish the equity of redemption. *Barron vs. Newberry*, 149.
2. ASSIGNEE MUST BE MADE PARTY.—A bankrupt from the time of rendition of the decree in bankruptcy, is *civiliter mortuus*, so far as his property is concerned, and the equity of redemption having passed out of him into his assignee, neither the bankrupt nor any court other than the court in bankruptcy can by proceedings to which the assignee is not a party affect his title to the property. *Ib.*
3. The mortgagee cannot plead a want of notice, all parties in the absence of fraud being chargeable with notice of proceedings in bankruptcy. *Ib.*
4. The property having been sold by the assignee, under order of the court, the purchaser is entitled to redeem. *Ib.*
5. Title by possession and payment of taxes under state law will not prevent such redemption. *Ib.*

BARGES.

1. BARGES SUBJECT TO RULES OF NAVIGATION.—The use of barges having been found indispensable to a profitable navigation of the Ohio and Mississippi rivers in certain stages of the water, they are subject to the rules of navigation. *The Dick Keyes*, 408.
2. Goods, whether conveyed in the body of a steamboat or in a barge attached thereto, are subject to the same guaranties and protection. There is nothing in the addition of a barge connected with a steamboat which changes the character of transportation. *Ib.*
3. A contract for the use of a barge at a stipulated rate, is cognizable in admiralty, and a libel may be maintained against the steamboat using it. *Ib.*
4. BARGES—for bulk wheat must be firmly and well built, in the best manner and of the best materials; it is just as necessary that they should be tight, stanch and strong, as a ship or any other vessel. *The Northern Belle*, 529.

BILL OF LADING.

1. OPEN TO EXPLANATION.—A bill of lading is as between the original parties in the nature of a receipt, and is open to explanation. The respondents are not estopped from setting up a mistake, and that the property receipted for was not all delivered to them. *The J. W. Brown*, 76.

BILL OF LADING (*Continued*).

2. WHEN CARRIER NOT LIABLE FOR DEFICIENCY.—The respondents having satisfactorily shown that the whole of a cargo of wheat received by them was actually delivered to the consignee, are not liable for a deficiency from the amount receipted for in the bill of lading. *Ib.*

3. NO ESTOPPEL BETWEEN ORIGINAL PARTIES.—The doctrine of estoppel *in pais* is only applied to a bill of lading in the hands of a third party. *Ib.*

4. The fact that the shippers gave an order to the warehousemen for the cargo, and then settled with them on the faith of the bill of lading, does not take the case out of the general rule. *Ib.*

5. SIGNED IN BLANK, VOID.—Although the master of a vessel employed in navigating the lakes is agent of the owners for giving bills of lading for goods shipped on board, he has no authority from the owners to sign bills of lading in blank, and a bill of lading so signed is not valid against the owners, even in the hands of a *bona fide* holder. *The Joseph Grant*, 193. A bill of lading signed in blank by a master is no maritime contract binding on the vessel or owner. *Ib.*

6. Where two bills of lading describing the cargo shipped, were made out in full; one of which was signed by the master, and the other by the shipper, and a third one was signed in blank by the master and left with the shipper, who, after departure of the vessel, filled up the blank bill with a change of the consignee, and transferred it to a bank as collateral security for advances for the owners of the cargo, no maritime contract is thereby created between the bank and the vessel without notice to the master before delivery of the cargo according to the first bill of lading sent with the vessel. *Ib.*

7. The owner of the vessel is not estopped from having the circumstances attending the signing and transfer of the blank bill of lading inquired into by the court. *Ib.*

8. GOODS STOWED ON DECK.—Under an ordinary bill of lading the carrier is liable for goods stowed on deck and necessarily jettisoned. *The Wellington*, 279.

9. BILL OF LADING—WHEN NOT AFFECTED BY PAROL PROOF.—Although as a receipt a bill of lading is subject to explanation, and can be affected by parol proof, in so far as it is a contract, this rule does not apply. *Ib.*

10. SAME—LEGAL CONSTRUCTION AS TO STOWAGE.—Although it is not expressely stated in the bill of lading that all the goods shall be stowed under deck, yet such is its legal construction and effect, and proof of conversations before or at the time of its execution is not admissible to alter it in this respect. *Ib.*

11. WHEN FREIGHT MAY BE STOWED ON DECK.—If the master wished to stow a part of the goods on deck, he should have made a proper memorandum in the bill of lading, or obtained the written consent of the shipper, or have discriminated in the price of freight. *Ib.*

12. EXCEPTIONS IN BILL OF LADING.—Where the respondent has shown that the injury was occasioned by a cause excepted from the bill of lading, the burden of proof is thrown upon the libellant, to show negligence or want of reasonable skill and attention, *The Rocket*, 354.

BILL OF LADING (*Continued.*)

13. BILL OF LADING—WHEN THROUGH CONTRACT.—A steamboat bill of lading for the delivery of goods at a certain point, specifying the rate of freight to a more distant point, is a through contract, and binds the carrier to deliver at the latter point. *Woodward vs. Illinois Central Railroad Co.*, 403.
14. Although common carriers generally contract for safe transit only over their own lines, there is no valid reason why they cannot contract for the safe conveyance of freight over the different lines of communication to its place of destination. *Ib.*
15. EXCEPTIONS DO NOT ALWAYS EXCUSE CARRIERS.—The exception from fire liability inserted in a bill of lading, does not excuse the carrier in all cases of destruction by fire; he is, notwithstanding, bound to use reasonable care and vigilance, such as an ordinarily prudent man would exercise over his own property. *Ib.*
16. WHAT CONSTITUTES THROUGH BILL OF LADING.—A steamboat bill of lading for the shipment of goods at Memphis, to be delivered at Cairo, specifying the rate of freight through to Baltimore, and signed by the agents of the connecting railroad company, is a contract for through shipment, and the railroad company is entitled to the benefit of the exceptions contained in the bill of lading. *Same vs. Same*, 447,

BILLS.—*See* NOTES AND BILLS.

BLANK—BILL OF LADING SIGNED IN BLANK.—*See* BILL OF LADING, 5–7.

BOARD OF SUPERVISORS.—*See* MUNICIPAL BONDS.

BOATS AND VESSELS.—*See* ADMIRALTY.

BONA FIDE PURCHASER.—*See* MUNICIPAL BONDS 4, 6, 9, 11, 15. NOTES AND BILLS 6, 8, 10.

BONDS.—*See* MUNICIPAL BONDS.

" OF ADMINISTRATORS.—*See* EXECUTORS AND ADMINISTRATORS.

" OF MARSHALS.—*See* MARSHAL'S BONDS.

BURDEN OF PROOF.—*See* EVIDENCE, 1, 2.

CANAL BOATS.

1. CANAL BOATS IN CHICAGO RIVER.—In navigating the Chicago River, canal boats are not, except under special circumstances, bound by the rule that applies to vessels, which is, they must have a boat astern with a line ready to be thrown ashore in case of emergency. *The B. S. Sheppard*, 221.

CARRIER.—*See* COMMON CARRIER.

CASHIER.—*See* BANKING, 2, 3.

CHANCERY.—POWERS AND PRACTICE IN FORECLOSURE AGAINST RAILROAD COMPANY. *See* RAILROADS.

1. INJUNCTION NOT GRANTED ON THEORETICAL OPINIONS.—This court will not grant an injunction upon the theory that a dam cannot be con-

CHANCERY (*Continued.*)

structed as contemplated, without obstructing the navigable use of the river. Mere theoretical opinions are not sufficient in law for enjoining the progress of a work in the nature of a public improvement, authorized by a legislative act. *Woodman vs. Kilbourn M'f'g Co.*, 546.

2. INJUNCTION—WHEN GRANTED.—An injunction, being the strong arm of equity, ought never to be granted without the most complete conviction, on the part of the court, of its absolute necessity. *Potter vs. Schenck*, 515.

3. If it be true that the patentee is entitled to his claims of invention as his property, there is an end to all hardship, because no man ought either in in law or in morals to use the patentee's property without compensation and without his consent. *Ib.*

CONTRIBUTION BETWEEN TORT FEASORS.—*See* CONTRIBUTION.

CHATTEL MORTGAGE.

1. Although in Wisconsin a mortgage of a retail stock, not duly filed, nor accompanied with delivery of possession, is void as to creditors, a bill by preferred creditors against the mortgagors and the mortgagee, who is equally preferred, will not lie unless the mortgagee claims payment in full to their prejudice. *Bowen vs. Clark*, 128.

CITY ORDINANCES.

Concerning vessels they are binding only as police regulations: beyond this they have no force in the United States Courts. This court will allow them to be read, determining for itself their application to the subject matter. *The Palmetto*, 140. *The B. S. Sheppard*, 221.

COLLISION.

1. CONFLICTING EVIDENCE.—In cases of collision, the hypotheses and evidence of the respective parties are generally inconsistent. *The Delaware*, 110.

When there is a change in the course of a vessel, a person without a compass, standing on the deck of either, cannot, generally, say whether the change has been made by the vessel on which he stands, or the one on which his eye is fixed. *Ib.*

2. DUTY OF VESSELS MEETING.—A vessel that has the wind free, or is sailing before or with the wind, must get out of the way of the vessel close-hauled or sailing by or against it; and the vessel on her starboard tack has a right to keep on her course. *Ib.*

3. DUTY OF STEAMER.—So a steam vessel must get out of the way of a sail vessel, on the same principle, that the steam power gives the control of the vessel, as a vessel with the wind free. The exact variations of a vessel from her general course can only be known by the compass. *Ib.*

Where the light of a sail vessel appears to a steam vessel, at a distance of three or four miles, such light should be observed closely, in order that the steamer may avoid the vessel which carries it. *Ib.*

The steamer is bound to port its helm, and make way for a sail vessel where there is the least possibility of danger. *Ib.*

COLLISION (*Continued.*)

4. TRINITY RULES DEFECTIVE.—The Trinity Rules, sanctioned by the Supreme Court, were designed chiefly for the government of vessels on the Thames, and in their application in this country are defective. The defects consist in the conditional application of the rules. Some instances stated. *Ib.*

   A rule of navigation should be simple, plain, and absolute. *Ib.*

5. It is negligence in a steamer not to guard against the contingencies of a shifting wind, and the accidents to which a sailing vessel is liable; the point of danger is not passed until the vessels have passed each other. And although such vessel may change its course from apprehension of danger, the steamer is in fault for not keeping out of the way, although the sail vessel may not be faultless. In such a case there is a mixed fault and the damage done from a collision should be divided between the parties. *Ib.*

6. EXCEPTIONS.—There are exceptions to the general rules of navigation, for which no regulations can be provided *The Pilot*, 159.

   Under such circumstances each vessel should be managed with care and skill, to avoid a collision, and if there be a failure to do this, though a vessel be within the rule, she can claim no damages for injuries received. *Ib.*

   A strict adherence to the rule, which necessarily leads to a collision, affords no excuse to a vessel. *Ib.*

7. STEAMER MEETING SAIL VESSEL.—A steamer is required to give way to a sail vessel; yet, if she cannot do so without peril, the sail vessel must avoid her. It is no objection to the jurisdiction that the sail vessel was less than twenty tons burden, nor that the collision was near the Canada shore. *Ib.*

8. WHEN SAILING VESSEL SHOULD CHANGE HER COURSE.—The master of a steamer has a right to expect that an approaching sail vessel will change her course if she can do so without risk, and any other course will involve danger of collision. *Ib.*

   No sail vessel which recklessly attempts to cross the line of a steamer when there is no necessity for doing so, and when the steamer could not give way without encountering peril, can be entitled to recover for an injury received. *Ib.*

9. IN CHICAGO RIVER, WHAT TOO HEAVY A TOW.—In a stream as narrow and crowded as the Chicago river, a tow of nine loaded canal boats is under ordinary circumstances, too heavy for a tug; and although the tow is almost exclusively under the control of the tug, if the latter, being the agent of the boats, is overtasked, the boats must answer for the fault. *The Palmetto*, 140.

10. DUTY OF MOVING VESSELS.—It is the imperative duty of all craft navigating the river, to avoid coming in contact with vessels moored to the wharf, and in case of collision, the presumption is that the former is in fault, and, if they from carelessness, negligence, or want of skill, collide with a moored vessel, contributory fault of the stationary vessel does not excuse them. *Ib.*

COLLISION (*Continued.*)

11. CANAL BOATS IN CHICAGO RIVER.—In navigating the Chicago River, canal boats are not, except under special circumstances, bound by the rule that applies to vessels, which is, they must have a boat astern with a line ready to be thrown ashore in case of emergency. *The B. S. Sheppard*, 221.

12. VESSELS APPROACHING BENDS—HEADWAY.—Where a barque in tow of a tug is approaching a bend in the river, where it is narrow, and vessels are lying at the side, extreme caution should be used, and it matters not that at the time of the collision her motion was moderate, if, from a want of care immediately before, it was out of her power to check her headway at the proper time. *Ib.*

The barque should have had her anchor where it could be let go at once. *Ib.*

13. CITY ORDINANCES.—This court is not in all cases bound by the city ordinances regulating navigation. *Ib.*

14. VESSEL HAVING LOST HER LIGHTS—WHEN EXCUSABLE FOR RUNNING.—A sail vessel having lost her green and red lights in the night time, in a storm on Lake Michigan, may be excusable for pursuing her voyage, from necessity, during that night with the prohibited white light, but is in primary fault for running the next night, down the Straits of Mackinac where there was good anchorage, without the signal red and green lights. *The Gray Eagle*, 476.

15. HELD TO STRICTEST RULES.—A sail vessel running with the prohibited white light alone, in the night time, is under superior obligations to observe the strictest duty to avoid collisions. *Ib.*

16. LOOKOUT.—A sail vessel in an unseaworthy condition is in fault, when not having sufficient and competent lookouts, and an officer of nautical skill on deck. *Ib.*

17. DUTY OF OFFICERS.—The master of a vessel running in the night without the proper signal lights, having seen a sail vessel four miles ahead, went below, leaving a second mate in command, who was not skilled in seamanship, and no proper lookouts on deck, and when a collision became imminent, the second mate left his post and called up the master; *held*, these officers are in fault, and their evidence in regard to the collision is not reliable. *Ib.*

18. APPROACHING SAIL VESSEL.—A sail vessel in every respect seaworthy, meeting in the night time another sail vessel running on a calm water without the red and green signal lights, and with a white light alone, is justified in considering the white light to be the light of a vessel at anchor; and, in the absence of willfulness or gross negligence, is not in fault of a collision. *Ib.*

19. VESSEL DISREGARDING POSITIVE RULES.—A sail vessel running in the night time in disregard of the positive rules as to signal lights, is guilty of a violation of law, and if she caused thereby uncertainty and embarrassment with the men on the colliding vessel as to her motion and course, the colliding vessel should not be adjudged in fault for a mistake in endeavoring to avoid an impending peril. *Ib.*

COLLISION (*Continued.*)

20. DUTY OF PROPELLER ENTERING HARBOR.—A steam vessel entering a harbor is bound to observe the utmost vigilance to avoid collision with other vessels, and a propeller is negligent in entering the harbor of Milwaukee at the rate of eight miles an hour. *The Alleghany*, 497.
Having exchanged signals with a tug towing out a schooner, she is bound to keep the side of the channel agreed upon. If she sheers or refuses to obey the helm it becomes her duty to stop. *Ib.*

21. DUTY OF TUG MEETING.—The tug is entitled to half the river, and is not bound to keep close to the pier. *Ib.*

22. The tug with her tow had the character of a steamer going out on her own course, agreed upon with the propeller, which course she was bound to keep, and had the right to, exclusive of the propeller. *Ib.*
If she had attempted to cross the channel on seeing that the propeller sheered, and did not obey the helm she would have done so at her own risk, and there is no obligation upon her to maneuver in reference to the course of the propeller. *Ib.*

COMMON CARRIER.—*See* BILL OF LADING.

COMMON CARRIERS.

1. NOT BOUND TO CARRY MONEY.—A clause in the charter of a Railroad Company, requiring them to transport "all merchandise and property," does not oblige them to become carriers of money. *Kuter vs. Michigan Central R. R. Co.* 35.

2. Nor does the fact that they transport money for an express company under a special contract, make them such common carriers, and subject to extraordinary responsibilities as such. *Ib.*

3. DUTY OF SHIPPER TO DISCLOSE CHARACTER OF PROPERTY.—The general rule that the shipper is not bound to disclose to the carrier the kind, quality or value of the property, and that, in the absence of notice, or fraud or artifice on the part of the shipper, the carrier is liable, notwithstanding there was no disclosure, must be construed and applied subject to the usual course of business. If the property is put up or packed in a manner calculated to deceive the carrier, he does not become subject to extraordinary responsibilities as such; but if there is justly any doubt about the contents of a package, he should make inquiry. *Ib.*

4. SAME—WHEN CARRIER SHOULD MAKE INQUIRY.—An emigrant having packed and shipped a quantity of gold coin in the center of an ordinary dry-goods box, filled with clothing and household goods, *held:* If this was calculated to deceive the company as to the value of the contents, and by no reasonable inference could they have supposed that the box contained coin, they are not liable as common carriers. If, however, the defendants knew that parties emigrating, like the plaintiff, were in the habit of putting up valuable articles and money among their household goods, and from such knowledge might infer that the box of plaintiff might contain money, then it became their duty to make inquiry, in order to relieve themselves from liability. *Ib.*

COMMON CARRIERS (*Continued.*)

5. LIABLE AS BAILEE.—In every case where property is delivered to a carrier, to be transported for hire, if the circumstances are such as to relieve him of his extraordinary responsibility as a common carrier there is still an implied contract for ordinary care. *Ib.*

6. LIABILITY OF CARRIER—NOT DIMINISHED BY SPECIAL RISKS.—The law makes no distinction between common carriers on water. The fact that the navigation of the Mississippi river is attended with special risks and expenses does not diminish the liability of a carrier thereupon. *The Keokuk*, 522.

7. EXCEPTED PERIL—BURDEN UPON CARRIER.—When a loss or damage is shown, the burden is upon the carrier to bring it within the excepted peril. The exception is for his protection, and it is for him to establish it. It is not sufficient simply to show that the vessel was stranded. He must show that it was caused by an unavoidable danger of the river. *Ib.*

8. DUTY OF CARRIER AS TO VESSEL.—The first duty of a carrier by water is to provide a sea-worthy vessel, tight and stanch, and suitable in every respect to the particular service in which she may be employed. *The Northern Belle*, 529.

9. WHEN RELIEVED FROM DANGERS OF NAVIGATION.—Where a bill of lading contains the clause "dangers of navigation excepted," the carrier brings himself within the clause, when he shows that on a dark and stormy night, at the entrance of a harbor difficult of access, he mistook a light on shore in a line with the pier-light, for the latter, whereby the vessel went ashore and damaged a portion of the cargo. *The Juniata Paton*, 15.

10. BURDEN OF PROOF.—The carrier, in order to avail himself of the benefit of this restrictive clause, must bring his case strictly within the words of the exception, and for this purpose the burden of proof is upon him. *Ib.* A master may enter a harbor on a dark night, with a heavy sea and high wind, notwithstanding access be difficult, but not unusually dangerous or difficult, without incurring the imputation of negligence. *Ib.*

11. LIMITATION OF LIABILITY OF COMMON CARRIER.—A common carrier may by special contract, limit his common law liability to that of an ordinary bailee for hire. *York M'f'g Co. vs. Illinois Central R. R. Co.*, 377. He cannot, however, go beyond this, or escape liability for misconduct or negligence. *Ib.*

12. CARRIER HELD TO CERTAIN CARE, NOTWITHSTANDING EXEMPTION.—Under a contract exempting a carrier from liability in case of fire, he becomes an ordinary bailee, and is held only to that kind of care and diligence applicable to a bailee under the circumstances of the case. He is still held to due care and diligence as to the kind and quality of cars, the running and management of trains, the proper precautions against fire, etc., having reference to the season of the year, the character of the property, the country through which it was to be carried, and the nature of the transit. *Woodward vs. Illinois Central Railroad Co.*, 447.

13. AGENTS MUST BE VIGILANT.—Though the property catches fire without

CONTRACTS.

1. CONTRACT FOR FUTURE DELIVERY.—A contract for the sale and delivery of grain which the party did not have nor expect to have, is nevertheless valid. *Porter vs. Viets*, 177.
2. NOT A WAGER—INTENTION TO SETTLE "DIFFERENCE" CANNOT BE SHOWN.—Such a contract is on its face strictly legal, and is not a wager, and the defendant cannot be permitted to show that the intention of both parties was, that no grain should actually be delivered, but that the "difference" should be settled between them in cash. *Ib.*
3. Although it is true that by a settlement of the "difference" the same result is reached as in a wager, that circumstance does not make the original contract the same. *Ib.*
4. The defendant, in order to establish the illegality of the written contract, cannot establish orally a simultaneous contract alleged to be illegal. *Ib.*
5. EXECUTORY CONTRACT FOR TRANSPORTATION, or for the service of a vessel is not a subject of admiralty cognizance. *The Pauline*, 390.
   It is not a maritime contract nor is any lien created upon the vessel thereby. *Ib.*
6. On breach of such a contract the cause of action is purely of common law jurisdiction. *Ib.*

CONTRIBUTION.

1. BETWEEN TORT FEASORS.—Where a judgment has been regularly entered against joint defendants, and some have paid their *pro rata*, on a bill filed by others, setting up a secret agreement between themselves and plaintiffs that if they would abandon the defense, plaintiffs would not call upon them for any part of any judgment they might recover, a court of equity will not grant relief. Such an agreement is a fraud upon their co-litigants, and will not be sustained. *Sels vs. Unna*, 521.
2. Although, generally, contribution cannot be enforced between wrong-doers, still this court will not interfere to assist some of them in escaping such part of the common burden as they are equitably bound to pay. *Ib.*
3. The marshal having collected part of the judgment from some of the defendants, will be permitted to collect the balance from the others, notwithstanding this secret agreement. *Ib.*
4. Although the assignee of a judgment takes it subject to all existing equities, yet such an agreement constitutes no defense against an assignee in good faith, without notice. *Ib.*

COUNTY BONDS.—*See* MUNICIPAL BONDS.

CORPORATIONS.—*See* STOCK.

COUPONS.—*See* MUNICIPAL BONDS.

They are merely evidences of interest, and it is upon the bonds alone that the interest is recoverable, and the action of assumpsit will not lie. *Clarke vs. City of Janesville*, 98.

CREDITORS.—*See* ASSIGNMENT FOR BENEFIT OF CREDITORS.

DAMAGES.—*See* MEASURE OF DAMAGES.

DANGERS OF NAVIGATION.—*See* COMMON CARRIER, 6–9.

DEATH BY NEGLIGENCE.—*See* RAILROADS, 1–15.

DELIVERY.—*See* COMMON CARRIER, 21–25.

DESCENT.—*See* INHERITANCE.

DEMURRAGE.

1. ABANDONMENT OF LIEN FOR DEMURRAGE.—The owner of a vessel, having abandoned his lien on the cargo for demurrage, cannot maintain an action for damages against the shippers, who were merely agents. *Stafford vs. Watson*, 437.
2. If a master delivers a cargo, and receives the freight, without an agreement on the part of the person receiving it that it is to be held subject to a lien for demurrage, the lien is waived, and a libel for demurrage cannot be sustained against the cargo. *Winslow vs. 400 Barrels of Salt*, 459.
3. The fact that the master stated that he should look to the cargo for the claim for demurrage, is not sufficient to sustain the lien. *Ib.*

DIRECTORS.—*See* STOCK.

DISTILLED SPIRITS.—*See* REVENUE LAWS.

DIVIDENDS.—*See* RAILROADS, 16, 17.

DOMESTIC VESSELS.—*See* ADMIRALTY.

DUTIES.—*See* REVENUE.

ELECTION.—*See* MUNICIPAL BONDS, 4, 11, 12.

ENURING TITLE.

A mortgagee of lands to which the mortgagor had no present title, is entitled in equity, to the benefit of an after-acquired title. *Wright vs. Shumway*, 23.

EQUITY.—*See* CHANCERY.

ESTOPPEL.—*See* BILL OF LADING.

1. A municipal corporation may be estopped by its own acts, as well as a private individual. *Schenck vs. Supervisors of Marshall Co.*, 533.
2. The Board of Supervisors being authorized under certain circumstances to issue bonds, and having issued them, the presumption is that they were issued conformably to the authority, and the Board is estopped from denying their validity in the hands of a *bona fide* holder. *Ib.*

EVIDENCE.

1. EXCEPTED PERIL—BURDEN UPON CARRIER.—When a loss or damage is shown, the burden is upon the carrier to bring it within the excepted peril. The exception is for his protection, and it is for him to establish it. It is not sufficient simply to show that the vessel was stranded. He must show that it was caused by an unavoidable danger of the river. *The Keokuk*, 522.
2. BURDEN OF PROOF.—A carrier, in order to avail himself of the benefit of a restrictive clause, in a bill of lading, must bring his case strictly within the words of the exception, and for this purpose the burden of proof is upon him. *The Juniata Paton*, 15.

EVIDENCE (*Continued.*)

3. AUDITOR'S DEED—is *prima facie* good, and is a title deducible of record within the meaning of section 11, chapter 66, Revised Statutes of Illinois. *Matteson vs. Walker*, 62.
   When coupled with seven years' possession and payment of taxes, it is sufficient to protect a party who can connect himself with it. *Ib.*
4. The defendant, in order to establish the illegality of a written contract, cannot establish orally a simultaneous contract alleged to be illegal. *Porter vs. Viets*, 177.
5. OBJECTIONS TO TESTIMONY—WHEN TOO LATE.—Though the answer to a libel is not as full and explicit and distinct as required by rule 27, if no exceptions are taken to it, and the parties proceed to the taking of testimony, objections to the reading of the testimony on the ground of insufficiency of the answer will not be entertained. *The Rocket*, 354.
6. Oral Testimony is not competent to change the legal effect of a Bill of Exchange. *Olshausen vs. Lewis*, 419.

EXCEPTIONS.—*See* BILL OF LADING, 12, 15, 16. EVIDENCE.

EXECUTORS AND ADMINISTRATORS.

1. RELEASE BY ADMINISTRATOR.—Plea setting up a release from the former administrator, without showing that full payment was made, is bad, it being a general principle that an administrator cannot release or compromise a debt, except upon full payment. *Maryland ex. rel. vs. Todd*, [illegible].
2. Plea of *non damnificatus* can only be pleaded to indemnifying bonds. *Ib.*

FARM MORTGAGE.—*See* NOTES AND BILLS.

FORECLOSURE.

1. DECREE OF FORECLOSURE AGAINST BANKRUPT DOES NOT EXTINGUISH EQUITY OF REDEMPTION.—A decree of foreclosure against a man who had been duly adjudicated a bankrupt, his assignee not having been made a party, is insufficient to extinguish the equity of redemption. *Barron vs. Newberry*, 149.
2. ASSIGNEE MUST BE MADE PARTY.—A bankrupt from the time of rendition of the decree in bankruptcy, is *civiliter mortuus*, so far as his property is concerned, and the equity of redemption having passed out of him into his assignee, neither the bankrupt nor any court other than the court in bankruptcy can by proceedings to which the assignee is not a party affect his title to the property. *Ib.*
3. The mortgagee cannot plead a want of notice, all parties in the absence of fraud being chargeable with notice of proceedings in bankruptcy. *Ib.*
4. The property having been sold by the assignee, under order of the court, the purchaser is entitled to redeem. *Ib.*
5. Title by possession and payment of taxes under state law will not prevent such redemption. *Ib.*
6. HOW BARRED.—A statutory limitation of ten years should be applied to a bill to foreclose filed seventeen years after the mortgage debt was due, the mortgagee having notice that the land had been sold under prior mortgages, and for taxes, and that the purchaser was in possession, claiming

FORECLOSURE (*Continued.*)

title. This is true, although the statute was passed subsequent to the maturity of the mortgage debt. *Cleveland Ins. Co. vs. Reed*, 180.

7. Without such a statute equity would not disturb the possession or title of such a purchaser, he having been in possession fifteen years to the knowledge of the mortgagee. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity. *Ib.*

8. SUBSEQUENT MORTGAGEE NOT MADE PARTY.—Nor will the fact that the mortgagee was not made a party to the bills foreclosing the prior mortgages, under the circumstances of this case, enable the bill to be sustained. *Ib.*

Cases under the statute of limitations cited and commented upon. *Ib*

9. COMMON LAW LIMITATIONS REGARDED IN EQUITY.—Statutes for foreclosure and redemption are rules of property, and also laws of limitation; and in the absence of laws limiting proceedings in equity, the limitations as to similar demands at common law are considered as proper rules to be observed in courts of chancery. *Ib.*

10. JURISDICTION.—The United States Courts have not jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgagor and mortgagee are citizens of the same state. *Hill vs. Winne*, 275.

FORECLOSURE AGAINST RAILROADS.—*See* RAILROADS, 18, 19.

FORFEITURE.—*See* STOCK, 11, 14. REVENUE.

FRAUDULENT STOCK.—*See* STOCK, 1, 10.

GENERAL AVERAGE.—*See* ADMIRALTY, 48–50.

GOVERNMENT LANDS.

1. SETTLERS ON UNSURVEYED LANDS.—A covenant on the part of settlers on unsurveyed lands of the United States, to purchase those lands, as soon as surveyed and offered for sale by the Government, and then mortgage them to a creditor, to secure a debt, is not a contract in violation of sections 4 and 5 of the act of Congress approved March 31, 1830, for the relief of purchasers of public lands, and for the suppression of frauds at public land sales. *Wright vs. Shumway*, 23.

2. A mortgage given to secure a debt due and payable, no time of payment being specified, may be redeemed or foreclosed at any time. *Ib.*

3. WHAT CONSTITUTES A MORTGAGE IN EQUITY.—An equitable mortgage, springs from an agreement, express or implied, that there shall be a lien. A covenant by a debtor with his creditor, to purchase certain lands, and then mortgage them to him will be enforced in a court of equity by a decree of sale. *Ib.*

4. Where a settler on public lands, entitled to a pre-emption, procures a capitalist to pay the purchase money of the land into the land office of the United States, and allows him to take the receiver's receipt in his own name, or makes an assignment to him of his certificate of location as his security for such payment, receiving back the bond of said capitalist for a deed upon the re-payment, on a certain day, of the purchase money with interest, this is in equity a mortgage of the land, redeemable by the

GOVERNMENT LANDS (*Continued.*)

settler or his alienee at or before the time of payment, according to the condition of the contract. *Ib.*

5. ENURING TITLE.—A mortgagee of lands to which the mortgagor had no present title, is entitled in equity, to the benefit of an after-acquired title. *Ib.*

HUSBAND AND WIFE.—*See* MARRIED WOMEN.

IMPORTED SPIRITS.—*See* REVENUE LAWS.

INDORSEMENT.—*See* NOTES AND BILLS.

INHERITANCE.

RULE OF DESCENT.—A testator bequeathed a certain sum of money to a person in trust, to invest in lands in Wisconsin, in the names of six grandchildren, to be conveyed to and vested in them in fee simple, directing that in case of the death of any of said grandchildren, the share of the child so dying shall go to and vest in his or her surviving brothers or sister. After the lands were purchased, and deeds made conveying them in fee simple to the grandchildren as tenants in common, one of the grandchildren died intestate, unmarried, and without issue. The undivided interest of deceased in the lands passed by the laws of Wisconsin to the grandchild's father, and was subject to levy and sale for the father's debts. *Wood vs. Denny*, 73.

INJUNCTION.—*See* CHANCERY.

INNOCENT PURCHASER.—*See* MUNICIPAL BONDS, 4, 6, 9, 11, 15. NOTES AND BILLS, 6, 8, 10.

INSOLVENT LAWS.

1. A non-resident plaintiff who has brought suit in the courts of the state where the defendant resides has subjected himself to the jurisdiction of that state, and is bound by discharge afterwards granted under the insolvent laws of that state. *Davidson vs. Smith*, 346.

2. By obtaining a judgment in the Circuit Court of the United States for another state, upon a record of the judgment of the state court the plaintiff has not changed his position. A satisfaction of the judgment in the state court would operate as a satisfaction of that in the United States Court; and whatever would bar the former would also bar the latter. *Ib.*

3. Although a state insolvent law has no force or validity outside of the state, except such as may be given it by commity, the principle of the Constitution of the United States, that full faith and credit shall be given in each state, to the judicial proceedings of every other state, requires that judgments when sued on in another state shall be considered of the same force and effect as in the state wherein they were originally rendered. *Ib.*

INSPECTION.

1. A steamboat employed in transporting passengers between ports in the same state, is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852, and the District Court has no jurisdiction. *The Seneca*, 371.

INSPECTION (*Continued.*)

2. A vessel propelled in whole or in part by steam is not liable to a penalty for transporting goods, wares, and merchandise, without inspection of the hull and boilers under the act of Congress of August 30th, 1852. The penalty is alone for transporting passengers. *The Propeller Sun* 373.

INSURANCE.

1. YEAR CLAUSE IN POLICY—HOW WAIVED.—Where a policy of insurance contained a clause that the loss shall be paid within sixty days after it has been ascertained and proved, and another that if the loss is not paid suit is to be brought within one year after the loss, and claim was made within a reasonable time, and further proofs required and the company held out the promise or intimation that it would pay the loss, in consequence of which the plaintiff was prevented from bringing suit within the year. *Held*:—The company cannot be permitted to avail itself of these conditions of the policy. *Curtis vs. Home Insurance Company*, 485.
2. The conduct of the company and the negotiations must be such that the insured, as a reasonable person, is convinced that the company will pay the loss, otherwise he is bound to bring the suit within the time limited. *Ib.*
3. REQUIRING ADDITIONAL PROOF.—As long as the company ask for further proof, and he in good faith is attempting to furnish it, they by their own conduct induce him to believe that it is unnecessary to commence a suit. But as soon as he makes up his mind not to furnish any more proof he has no right to rely longer on the action of the company. *Ib.*

INTEREST.—*See* USURY.

INTERNAL REVENUE.—*See* REVENUE.

INVENTION.—*See* PATENTS.

JETTISON.—*See* ADMIRALTY, 48–50. BILL OF LADING, 8–11.

JURISDICTION.—*See* ADMIRALTY 1–18, 48, 51–55. ATTACHMENT.

1. The United States Courts have not jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgagor and mortgagee are citizens of the same state. *Hill vs. Winne*, 275.
2. MORTGAGE IS CHOSE IN ACTION.—A mortgage is a chose in action within the meaning of the eleventh section of the Judiciary Act. *Ib.*
3. ELEVENTH SECTION JUDICIARY ACT.—The rule that a promissory note payable to bearer is excepted from the prohibition of this section does not apply to an accompanying mortgage. *Ib.*
4. Doubtful jurisdiction not entertained. *Ib.*
5. An action cannot be maintained in this court against joint contractors where one of them resides in the same state with the plaintiff. *Lovejoy vs. Washburne*, 416.
6. If one is not served with process he may enter his appearance and join with the other in a plea to the jurisdiction, and the suit will be dismissed for want of jurisdiction. *Ib.*
7. STATE COURT.—The fact that a suit is connected with and grows out of

JURISDICTION (*Continued.*)

matters litigated in a state court, does not prevent this court from taking jurisdiction in the case, if otherwise within the 12th section of the act of 1789, for the removal of cases from the State to United States courts. *Hatch vs. Preston*, 19.

8. A decree of the state court binds all parties before it, and this court will not reverse or alter it, but where a second suit is brought to connect other parties with the transaction and obtain a decree against them, there is no force in the objection that this is not an original proceeding, and that this court by assuming jurisdiction, would interfere with the decree of the state court. *Ib.*

9. The defendants not being precluded from maintaining the main point in controversy here by anything appearing in the decree of the state court, it is within the meaning of the act a suit commenced against them. *Ib.*

10. JURISDICTION.—Where the defendant is a citizen of Illinois, and the plaintiff a citizen of another state, and an attachment writ is served upon property, and defendant personally served with process, this court can take cognizance of the case. *North vs. McDonald*, 57.

11. Under the act of April 10th, 1806, and on the general principle that where the courts of the United States have original jurisdiction, whether from the character of the claim, or the citizenship of the parties, they may entertain proceedings against the marshal and his sureties, the circuit courts have jurisdiction of suits on marshal's bonds without reference to the citizenship of the parties. *Wetmore vs. Rice*, 237.

The cases where such jurisdiction may not be exercised, are exceptional. *Ib.*

12. After judgment has once been entered for the penalty, it remains as security for all persons injured by default of the marshal. Complaints may be made, damages assessed, and executions issued, until the whole penalty shall have been recovered. *Ib.*

13. The United States Courts have jurisdiction in all cases of marshal's bonds, irrespective of the citizenship of the parties, and this jurisdiction rests on the ground that within the meaning of the Constitution they are cases under the laws of the United States. *United States ex rel vs. Davidson*, 433.

14. Although the courts had no authority to maintain actions in this class of cases until Congress exercised the power to give jurisdiction, the act of April 10th, 1806, having provided for suits on marshal's bonds, this jurisdiction is established. *Ib.*

15. Under this act it is optional with the injured party to bring the suit on the bond in his own name, or in the name of the United States, and the United States is not substantially a party to the record. *Ib.*

16. PRIORITY OF JURISDICTION—DETERMINED BY SERVICE OF PROCESS.—Priority of jurisdiction as between the state and the United States courts is determined by the service of process, and not by the date of the commencement of the suit. *Bell vs. Ohio Life and Trust Co.*, 260.

The appearance of counsel for defendants is a waiver of notice of an injunction. *Ib.*

JURISDICTION (*Continued.*)

17. SAME—NOT BY ISSUING OF PROCESS.—The rule that the issuing of a summons is such a commencement of a suit, as to raise the statue of limitations, does not apply to cases of this character; nor does the code of the State of Ohio contemplate that the simple issuing of the summons, without service or other appearance, shall give jurisdiction over the subject matter. *Ib.*

18. JURISDICTION HAVING ATTACHED IS EXCLUSIVE.—Where process has been served and an injunction issued in this court, jurisdiction attaches to the exclusion of a state court in which a suit had been previously commenced, but no process served. *Ib.*

19. OTHER COURTS AND OFFICERS NO AUTHORITY.—After the issuing of such an injunction a state court has no authority to take action or make orders in regard to the subject matter over which jurisdiction had been exercised by this court; nor have its officers any right to the possession of or control over such subject matter. *Ib.*

If they obtain such possession, or exercise such control, they are interfering with the process of this court. *Ib.*

This court will, in such case, order the return to its receiver of all property over which its jurisdiction had attached. *Ib.*

LANDS.—*See* GOVERNMENT LANDS.

LIEN.—*See* ADMIRALTY. WAIVER.

ABANDONMENT OF LIEN FOR DEMURRAGE.—The owner of a vessel, having abandoned his lien on the cargo for demurrage, cannot maintain an action for damages against the shippers, who were merely agents. *Stafford vs. Watson*, 437.

LIGHTS OF VESSELS.—*See* COLLISION, 14–19.

LIMITATIONS.—*See* STATUE OF LIMITATIONS.

LOOKOUT.

A vessel in an unseaworthy condition is in fault, when not having sufficient and competent lookouts, and an officer of natical skill on deck. *The Gray Eagle*, 476.

LETTER IN MAIL.

1. WHO MAY OPEN IT.—A letter once placed in the postoffice is in the custody of the law, and no one except the writer and the person to whom it is directed, or some one authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents. *United States vs. John Eddy*, 227.

2. NOT OFFICERS.—Neither postmasters nor other officers have any authority to open it under the pretext that there might be something improper or even criminal therein. *Ib.*

3. LETTER OF CRIMINAL PROTECTED.—The letter of a criminal is under the full protection of the law. *Ib.*

The violation by a criminal of an agreement that the sheriff was to inspect all letters written by him before they left the jail, would not author-

LETTER IN MAIL (*Continued*).

ize the sheriff to open a letter after it was in the postoffice. Nothing but his consent in regard to that particular letter would so authorize him. *Ib.*

4. STATE LAWS EXCLUDED.—When a letter is placed in a postoffice it is within the legal custody of the officers or agents of the government, and while it so continues, the laws of the United States operate upon it to the exclusion of state laws. *Ib.*

LIBEL.—*See* ADMIRALTY.

MAIL, *See* LETTER IN MAIL.

MANDAMUS.

1. REMOVAL FROM STATE COURT.—The United States Circuit Court has no power to issue a writ of *mandamus* to a state court for the removal of a cause. Congress undoubtedly could give them such power, but it has not done so. *Hough vs. Western Transportation Co.*, 425.

2. The remedy is by appeal to the Supreme Court of the state, and thence by writ of error to the United States Supreme Court. *Ib.*

MARITIME LIEN.

1. PARAMOUNT TO STATE LIEN.—A maritime lien on a vessel is paramount to a domestic lien, under the statute of a state, of subsequent date. And if a judgment and sale take place under the statutory lien, it will not displace or affect the prior lien. *The John Richards*, 106.

2. The vessel in the hands of such purchaser is subject to the prior lien. *Ib.*

3. JURISDICTION.—The purchaser, under the statute lien, could not object to the jurisdiction of the admiralty court, as the suits and rights of the parties are distinct. *Ib.*

4. NOT BARRED.—Though the statute declares that all claimants may come in, and that all liens not presented are barred, this cannot affect a maritime lien. *Ib.*

MARRIED WOMEN.

1. A MARRIED WOMAN—living with her husband and carrying on trade in her own name, cannot, in Wisconsin, become his debtor nor be garnisheed in proceedings against him. *Avery vs. Doane*, 64.

2. *It seems* that she cannot hold to the exclusion of her husband or his creditors, a stock of goods purchased upon credit, nor the proceeds or profits. *Ib.*

MARSHAL'S BONDS.—*See* JURISDICTION, 11–15.

MASTER.—*See* BILL OF LADING, 5–7.

1. Has no lien upon a vessel for services as pilot, he acting in both capacities. *The Eolian*, 321.

2. The trusts committed to the master and pilot, should never be united in the same person, except temporarily, and under an emergency. *Ib.*

MATERIAL MEN.—*See* ADMIRALTY.

MEASURE OF DAMAGES.

1. A clear and simple rule for damages for infringement of patent is to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention. *Case vs. Brown*, 382.

MEASURE OF DAMAGES (*Continued.*)

2. Is the net value of the property at its point of destination, deducting freight. Interest may also be added. *Woodward vs. Illinois Central R. R. Co.*, 403-447.

3 WHEN LIABLE FOR PORTION SAVED.—A portion of the goods having been saved from a car, loaded in part with plaintiff's property, and in part with property of other parties, the carrier, in the absence of proof that the portion saved had been delivered to the owners, is liable for that portion in any event. *Ib.*

4. If the city has been guilty of negligence, and in consequence a vessel has been obliged to cut her way out of the ice, the damages would be, 1st, the necessary expense incurred; 2d, reasonable damages for the delay; 3d, the damages actually sustained by the vessel. But no damages can be given for injuries sustained in doing anything not warranted by skill and prudence. *Scott vs. City of Chicago*, 510.

MONEY AS BAGGAGE.—*See* COMMON CARRIER, 1-5.

MORTGAGE.—*See* FORECLOSURE, USURY, FARM MORTGAGE, CHATTEL MORTGAGE.

1. Is a chose in action within the meaning of the Eleventh Section of the Judiciary Act. *Hill vs. Winne*, 275.

2. ELEVENTH SECTION JUDICIARY ACT.—The rule that a promissory note payable to bearer is excepted from the prohibition of this section does not apply to an accompanying mortgage. *Ib.*

3. WHAT CONSTITUTES A MORTGAGE IN EQUITY.—An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. A covenant by a debtor with his creditor, to purchase certain lands, and then mortgage them to him will be enforced in a court of equity by a decree of sale. *Wright vs. Shumway*, 23.

4. Where a settler on public lands, entitled to a pre-emption, procures a capitalist to pay the purchase money of the land into the land office of the United States, and allows him to take the receiver's receipt in his own name, or makes an assignment to him of his certificate of location as his security for such payment, receiving back the bond of said capitalist for a deed upon the repayment, on a certain day, of the purchase money with interest, this is in equity a mortgage of the land, redeemable by the settler or his alienee at or before the time of payment, according to the condition of the contract. *Ib.*

5. ENURING TITLE.—A mortgagee of lands to which the mortgagor had no present title, is entitled in equity, to the benefit of an after acquired title. *Ib.*

6. A mortgage given to secure a debt due and payable, no time of payment being specified, may be redeemed or foreclosed at any time. *Ib.*

MORTGAGEE,—MAY CLAIM SALVAGE.—*The Barney Eaton*, 242.

MUNICIPAL BONDS.

1. A bond under seal given by a city to a Railroad Company located in the same state cannot be sued in the federal courts, even by an assignee. *Clarke vs. City of Janesville*, 98.

MUNICIPAL BONDS (*Continued.*)

2. Interest coupons annexed to such a bond, and referring to it have no independent vitality, and, even though made payable to bearer, come under the same rule. *Ib.*

3. Such coupons are not negotiable paper. They are merely evidences of interest, and it is upon the bonds alone that the interest is recoverable, and action of assumpsit will not lie. *Ib.*

4. HOLDER OF NEGOTIABLE CITY BONDS NOT BOUND TO EXAMINE CITY RECORDS.—The holder of a city bond issued to a plank road company or bearer in aid of the construction of the road, pursuant to a legislative act, is not bound to examine the records of the city to ascertain whether the resolution of the council for issuing the bonds corresponds with the resolution recited in the bonds. The recital in the bond binds the city in an action by a *bona fide* holder. *Mygatt vs. City of Green Bay*, 292.

5. MAKING BONDS PAYABLE IN DISTANT PLACE DOES NOT RENDER THEM VOID.—Where city bonds are issued to a corporation or road company payable in the city of New York, without express authority of law to make them so payable, the bonds are not void for this reason, but the city is not bound to transport funds to New York for their payment. *Ib.*

6. PURCHASER SHOULD TAKE NOTICE OF ACT AUTHORIZING ISSUE.—The act under which the bonds are issued is the basis of the contract, and dealers in such bonds should take notice of the act, it being a public statute. *Ib.*

7. LAW AUTHORIZING CITY TO ISSUE BONDS NOT A GENERAL LAW—BONDS VALID THOUGH ACT PUBLISHED AS PRIVATE ACT.—Where the constitution of a state requires that all general laws shall be published before going into effect, a legislative act authorizing a city to issue bonds for stock in a railroad company, is not a general law within the constitutional provision, and the bonds are valid, although the act was not published before they were issued, and then in the volume of private and local acts. *Luling vs. City of Racine*, 314.

8. The city issuing such bonds in pursuance of the act cannot controvert the constitutional power of the legislature to declare, in the body of the act, that it shall take effect immediately after its passage. *Ib.*

9. PAYMENT OF INTEREST, &C., AFFIRMANCE OF BONDS.—Where the city authorities paid the interest on the bonds for several years, and the inhabitants of the city elected commissioners to represent the stock received for the bonds, while they were passing as promissory notes payable to bearer, such acts are in affirmance of the bonds in favor of a *bona fide* holder, and he was not bound to look further. *Ib.*

10. An act authorizing a city to issue bonds payable in twenty years, allows the city to make the bonds payable in twenty years from the act, and the bonds are valid, although not made payable twenty years from their date. *Ib.*

11. County bonds in all respects regularly issued by the Board of Supervisors, except that the notice of the election, at which the authority to issue the bonds was given, proceeded from the County Court instead of the

MUNICIPAL BONDS (*Continued.*)

Board of Supervisors, but on which the county had paid interest for nine years, are valid in the hands of *bona fide* holders. *Schenck vs. Supervisors of Marshall County*, 533.

12. The election having been held in due form, there is simply a defective execution of the power, and not a defect in the power itself. *Ib.*
13. On questions of commercial law this court, although respecting the opinions of the Supreme Court of the State, is not bound by its decisions. *Ib.*
14. A municipal corporation may be estopped by its own acts as well as a private individual. *Ib.*
15. The Board of Supervisors being authorized under certain circumstances to issue bonds, and having issued them, the presumption is that they were issued conformably to the authority, and the Board is estopped from denying their validity in the hands of a *bona fide* holder. *Ib.*

NAVIGABLE RIVERS.—*See* CONSTITUTIONAL LAW.

NAVIGATION.—*See* COLLISION. ADMIRALTY.

1. BAD SEAMANSHIP.—To run at full speed, in a fog, along shore, where a mistake in reckoning might run the vessel aground. The vessel should stop, or slacken speed and heave the line. *The Rocket*, 354.
2. DUTY OF CARRIER.—Although a dense fog is a danger of navigation, yet the carrier is not excused if the loss occurs by a peril which might have been avoided by the exercise of reasonable skill and diligence. *Ib.*
3. Knowledge of the time required for running between two points on the same side of the lake forms no excuse for continuing the same speed allowable in the open lake. *Ib.*
4. DEFLECTION OF COMPASS.—From some accidental or unforeseen cause, may be a danger of navigation, but before the court would consider it an excuse for an accident, it must be clearly shown, by undoubted proof, that the officers of the vessel understood and discharged their full duty. *Ib.*
5. The theory of magnetic influence in a fog does not require any consideration from the court. *Ib.*

NEGLIGENCE.—*See* RAILROADS, 1—15.

1. ENTERING HARBOR.—A master may enter a harbor on a dark night, with a heavy sea and high wind, notwithstanding access be difficult, but not unusually dangerous or difficult, without incurring the imputation of negligence. *The Juniata Paton*, 15.
2. LIMITATION OF LIABILITY OF COMMON CARRIER.—A common carrier may by special contract, limit his common law liability to that of an ordinary bailee for hire. *York M'f'g Co. vs. Illinois Central R. R. Co.*, 377.
3. He cannot, however, go beyond this, or escape liability for misconduct or negligence. *Ib.*

NOTES AND BILLS.—*See* MUNICIPAL BONDS, USURY.

1. WHEN HOLDER OF DRAFT BOUND TO USE DILIGENCE.—If the maker of a draft had a well founded expectation that if presented within a reasonable time it would be honored, the holder must, in order to recover against him, use due diligence in presenting it, and give him notice of its dishonor. *Olshausen vs. Lewis*, 419.

NOTES AND BILLS (*Continued.*)

2. BILL OF EXCHANGE.—The following instrument:

"ST. LOUIS, May 10, 1861.

At sight pay to the order of Stilwell, Powell & Co., four thousand dollars, value received, and charge the same to the account of

LEWIS, PAGE & Co.

To the Marine Bank of Chicago, Ill."

————is a bill of exchange, and not a check. *Ib.*

3. It is payable in the current coin of the country, and not in depreciated bank notes. *Ib.*

4. Oral testimony is not competent to change its legal effect. *Ib.*

5. EFFECT OF HOLDING.—The holder having retained it at Chicago more than a month without presentation, and not having protested it until three weeks after that time, is guilty of such negligence that he cannot recover of the drawer. *Ib.*

6. BONA FIDE HOLDERS MAY ENFORCE.—A note given to a Railroad Company as subscription for stock, may be enforced by a *bona fide* holder, notwithstanding existing agreements or equities between defendant and the company. *Cooper vs. Laber*, 539.

7. COLLATERAL AGREEMENT.—An agreement made by the company at the time of the giving of the note, and as a part of the same transaction, that it would save defendant harmless on his subscription, does not constitute a valid defense unless the plaintiff can be charged with notice. *Ib.*

8. REPRESENTATIONS.—The fact that the plaintiff knew for what the note and an accompanying mortgage were given, makes no difference; nor do any false or fraudulent representations made to induce defendant to execute the note, unless notice of them is brought home to the plaintiff. *Ib.*

9. INFORMAL INDORSEMENT CURED.—The plaintiff having received the note and mortgage attached to, and as collateral security for a bond of a railroad company, containing a clause that the note and mortgage were assigned and transferred "in connection with the bond and not otherwise," but without any written indorsement, any informality in such transfer is cured by the written indorsement of the note made before maturity by the President with the knowledge and consent of the Board of Directors. *Ib.*

10. MAKER MUST RESPOND TO INNOCENT HOLDER.—The rule of law that the defendant having executed the note and enabled the company to raise money on it, must respond to an innocent holder, is well established and founded on the plainest principles of justice and equity. *Ib.*

11. WHEN SECURITY TO INDORSER WILL DISPENSE WITH NOTICE.—The transfer of property by the maker of a promissory note to the indorser for the express purpose of paying the debt will dispense with notice of non-payment, if the amount of property thus assigned be sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned. *Woodbury vs. Crum*, 284.

NOTES AND BILLS (*Continued.*)

12. If, however, the assignment to the indorser is in trust for general creditors, and sufficient only for the payment of a small portion of the debts of the maker, such transfer, although including all the debtor's property, is not sufficient to excuse the want of notice to the indorser. *Ib.*

13. RESTRICTIVE BILLS OF EXCHANGE.—An indorsement on a bill of exchange, "credit my account," is restrictive, and puts an end to its negotiability. It is an appropriation of the proceeds which renders any other appropriation illegal. The credit should be given when the bill became payable—this is the ordinary course of dealing, and the court will not presume a different course. *Lee vs. Chillicothe Branch Bank*, 325.
Whether an indorsement is restrictive depends upon the intention of the parties, as expressed. *Ib.*
Such an indorsement implies an open account, which is to be credited, and this can only be done by payment. Entering the bill, either before or after maturity, as a credit on the account, would not be within the order—the words are mandatory. *Ib.*

14. INDORSEMENT.—"PAY TO ACCOUNT OF," ETC., IS RESTRICTIVE, AND NOT A TRANSFER.—An indorsement to pay for the use, or account of the indorser, is not an assignment of the security, but only an authority to receive the money, and imports that the indorsee receives the bill for a special purpose, and as trustee for the indorser; it is equivalent to a direct notice to every party to whom it may be afterwards presented, that he has not a right to dispose of it as his own property. *Ib.*

15. HOLDER OF RESTRICTED BILL IS TRUSTEE.—A holder who takes a bill, the circulation of which is restricted by indorsement, cannot in good faith sue the drawer or acceptor, but holds the bill or its proceeds as trustee for the restraining party. *Ib.*

16. PAYEE HAS POWER TO LIMIT.—The payee, having the absolute property in the bill, and the right of disposition thereof, has the power of limiting the payment to whom he pleases. *Ib.*
If a bill be restrictively indorsed, a subsequent indorser takes it upon the same trust that was devolved upon the first indorsee. *Ib.*

17. BUT RESTRICTIVE INDORSEMENT GIVES AN EQUITY.—But the indorsement, though not conveying the property in the bill, gives an undoubted equity to the money to be paid; and this it is the safer and better course to enforce. *Ib.*

18. PARTY WHOSE NAME NOT ON BILL CANNOT BE SUED.—A party whose name does not appear upon a bill of exchange cannot be sued upon it. His name may be signed by an agent, but it must appear that the agent undertook to bind his principal. *Ib.*

NOTICE.—*See* FORECLOSURE, 1, 8. MUNICIPAL BONDS. NOTES AND BILLS, 11, 12.

ORDINANCE.—*See* CITY ORDINANCE.

PARTIES.—*See* FORECLOSURE, 1, 4, 8.

PARTNERSHIP.—*See* ASSIGNMENT FOR BENEFIT OF CREDITORS.

PASSENGERS.—*See* RAILROADS.

PATENTS.

1. The claims of a patent are to be construed with reference to the state of the art at the time of the invention. *Pitts vs. Wemple*, 87.
2. The whole patent including the specifications and drawings, is to be taken into consideration, but we look only at them for the purpose of placing a proper construction on the claim. *Ib.*
3. The invention set forth in the first claim of Pitts' patent consists in the peculiar construction of the apron and of its use in the machine, and operating substantially as described. It does not consist of an endless apron merely, or of an endless apron divided into troughs or cells merely, but of the apron as it is described operating in the machine substantially as described, that is, such an apron in such a machine. *Ib.*
4. It is not necessary that a prior machine should have been actually used for the purpose contemplated, but it must have been capable of such use, and a mechanic of competent skill should be able in the then state of the art to construct the machine, so as to produce the result, from an inspection of the specification and drawings. *Ib.*
5. A man may obtain a patent for an invention and let it lie in the Patent Office without use, and no one else would have the right to use such invention because it is his property. *Ib.*
6. Still in ascertaining whether the machine is capable of use, it may be important to know that the inventor had never made or used the machine, because the presumption is, that a person obtains a patent for something practical and not for a mere experiment. *Ib.*
7. The question is not whether the apron of the defendant's machine operates as perfectly as the apron of the plaintiff's machine, but whether it is the same in principle or not. *Ib.*
8. By the principle of a machine or improvement is to be understood the peculiar mode, manner or device by which the proposed result or effect is produced. *Ib.*
9. The superior utility of the defendant's elevator is not of itself a certain test upon the question of identity, because the defendant's machine might contain the whole substance of the plaintiff's and something in addition, and the addition would not prevent it from being an infringement. *Ib.*
10. VARIETY OF FORM NOT A CHANGE OF PRINCIPLE.—When a mechanic has the leading idea which is developed in Wilson's patent, once thoroughly understood and fixed in his mind, he can carry out that idea in a variety of forms, simply by the exercise of mechanical ingenuity, which nevertheless are not substantial variations from the invention patented. *Potter vs. Schenck*, 515.

    Merely reversing the feeding bar of Wilson does not change the principle of his invention. *Ib.*
11. INJUNCTION—WHEN GRANTED.—An injunction being the strong arm of equity, ought never to be granted without the most complete conviction, on the part of the court, of its absolute necessity. *Ib.*
12. If it be true that the patentee is entitled to his claims of invention as his property, there is an end to all hardship, because no man ought either in

PATENTS (*Continued.*)

law or in morals to use the patentee's property without compensation and without his consent. *Ib.*

13. It is the right and privilege of a party, when an idea enters his mind in the essential form of invention, to perfect by experiment his original idea, so as not to be deprived of the fruit of his skill and labor by a prior patent, if he is the first inventor; but there must be a reasonable diligence, looking at all the facts of the case. *Cox vs. Griggs*, 362.

14. It is necessary, in order to prevent a man from having the benefit of his patent, that another should have first discovered the thing and reduced it to actual practice. *Ib.*

If two persons are jointly experimenting and equally meritorious, a doubt should be solved in favor of him who first obtains a patent. *Ib.*

15. "Useful," in the patent law, is in contradistinction to "mischievous:" the invention should be of *some* benefit. *Ib.*

16. The question, as to infringement, is not whether the defendant's machine works the best, but, does it use the plaintiff's invention. *Ib.*

17. DELAY IN PATENT OFFICE.—A patentee cannot be held accountable for the delays in the Patent Office, the law, by its terms, providing for the perfection of imperfect and insufficient specifications even after the patent issues. *Sayles vs. Chicago & Northwestern R. R. Co.*, 468.

18. The law looks with indulgence upon the delays which arise from the circumstances of parties who make an invention, and it is only when the invention is intentionally abandoned or neglected, or the parties show by their acts, that they have not done all they can do, that the law declares that they shall not be protected. *Ib.*

19. DOCTRINE OF EQUIVALENTS,—should be critically scanned where there may be a difference in relation to two machines, which, in some respects, operate by equivalent devices, and in other respects do not, to ascertain whether one has become a practical machine, while the other is not. *Ib.*

20. CONTINUED USE NOT NECESSARY.—When an improvement or a machine has been once made and used, it is not necessary that it should be used up to the time that another person may make a similar improvement. If it has been once used, and is a practical improvement or machine, no one else can claim to be the inventor. *Ib.*

21. A claim in a patent for an entire machine does not deprive the patentee of his right to claim the parts also. *Foss vs. Herbert*, 121.

22. It is not necessary, to constitute an infringement, that the whole machine should be used. If either one of the parts claimed is used in substantially the same manner in a similar machine, it is an infringement. *Ib.*

23. It is not material what the *theory* of the patentee, in regard to his invention, may be; but the question is, do the tools used by the defendant act substantially in the same manner, and produce substantially the same result as those of the plaintiff? *Ib.*

24. The drawings are a part of the description of the thing patented, and are to be considered with the specification. *Ib.*

25. A man may improve a patented machine so as to entitle him to a patent

PATENTS (*Continued.*)

for his improvement; but that will not give him the right to use the invention of the first patentee without his license. *Ib.*

26. The question to be determined on the issue of infringement, is, whether under a variation of form, or, by the use of a thing which bears a different name, the defendant accomplishes, in his machine, the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure and purpose. *Ib.*

27. If the change introduced by the defendant (as, for instance, the substitution of the spring for the roller) constitutes a mechanical equivalent in reference to the means used by the patentee; and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, (as, for instance, the effect claimed in its action on winding or warped boards), it will still be an infringement, as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention. *Ib.*

28. It is of no consequence, with respect to the question of infringement, whether the cutters of the defendant are like or unlike the plaintiff's in repects to their cost, adjustability, mode of sharpening, or any other peculiarity of construction, provided that, notwithstanding such difference of construction, they are in their mechanical action, operation, and effect in the combination, the same with those of the plaintiffs. *Ib.*

29. At law, a notice is essential to authorize the defense of want of novelty. In chancery the rules of pleading equally require the same matter to be set up. *Pitts vs. Edmonds*, 168.

30. The most valuable inventions consist in the combination of known mechanical powers. Every part of such inventions may be found in some form, among the various devices of human ingenuity, and the man who unites these powers, and produces a new and important result to society, is well denominated a public benefactor. *Ib.*

31. It is not the man who may form an imperfect machine, which may suggest to a higher order of mind valuable ideas, but it is the one who embodies those ideas in a practical and working form whom the law protects. *Ib.*

32. A patent, in calling for a specific mode, embraces in law all mechanical equivalents, or modes which operate on the same principle, consequently all modes, however changed in form, but which act substantially on the same principle, and effect the same end are within the patent. If this were not so, a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill. *Ib.*

33. USE OF PATENTED BRAKES by assignee of railroads. The use by the assignee, of cars which have patented brakes attached to them, does not render him liable to account for infringement of the patent, when the brakes have been licensed to the company by the patentee. *Emigh vs. Chamberlain*, 367.

The assignee uses the brakes as an agent of the company, and not as a purchaser. *Ib.*

PATENTS (*Continued.*)

34. The claim of Case for the combination of the valve in the seed tube, the valve in the seed hopper, and the lever with its arrangement for re-adjusting the valves as described, construed. *Case vs. Brown*, 382.

35. PATENTEE NOT CONFINED TO PRECISE FORM OF HIS COMBINATIONS.—Any person who takes the substance, although the form may be changed, violates the patent. *Ib.*

36. PRIOR DESCRIPTION, WITHOUT PATENT.—If a prior invention be described in an application made to the Patent Office for a patent, it can make no difference whether it was actually patented or not. *Ib.*

37. A RESULT OR AN EFFECT CANNOT BE PATENTED.—Only the particular mode which the patentee has devised. In this case the patentee can only claim the double dropping by his particular mode. *Ib.*
Where the patentee devised, not the various parts, but the whole combination, it is not an infringement to use a part of the combination. *Ib.*

38. DAMAGES.—A clear and simple rule of damages is to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff. *Ib.*

39. The invention of Obed Hussey, under his patent of August 7, 1847, and re-issued in 1857, consisting of a vibrating scalloped cutter, combined with slotted guard-fingers fastened in front and open in the rear, held valid. *Hussey vs. McCormick*, 300.

40. It is immaterial whether such opening be placed below or above the cutter, as the patent makes no such distinction. *Ib.*
Nor is it material that the scallops upon the cutter should be of any particular depth, or that the angle they make should be greater or less. A right which may be lost by the variation of an angle can be of no value. *Ib.*

41. The legal presumption is, from the action of the Patent Office, that the re-issued patent is for the same invention as the original patent. *Ib.*

42. Differences in the claims are consistent with the identity of the thing designed to be patented in both patents, it being one object of the surrender to correct by changing the description, or claim, or both. *Ib.*

43. Stevens' claim fairly interpreted means the particular combination and arrangement of lever, link-rods and rubbers in a car, as he had described it, so as to produce the described result, viz: the retarding of each wheel of the car when the brake is applied with uniform force. *Emigh vs. Chicago, Burlington & Quincy R. R. Co.*, 400.

44. Though all the parts of a combination be old, a new combination, producing a new result, may be patented. *Ib.*

45. A license to a railroad company extends no further than the road which it used or was authorized to construct at the time of the license; it cannot use the patent on lines afterward built or leased. *Ib.*

PILOT.

Master should not act as pilot. *The Eolian*, 321.

PERILS OF THE SEA.—*See* ADMIRALTY, 36.

PLEADING.

1. FORGED INDORSEMENT—NO SUIT CAN BE BROUGHT UNDER.—One partner having given the firm note, and forged the name of the payee to procure its discount at bank, no suit can be maintained by the Bank under the assignment. *York Bank vs. Asbury*, 230.
2. SUIT IN NAME OF PAYEE.—The Bank may, however, bring an action in the name of the payee for its benefit. *Ib.*
3. WHEN JUDGMENT A BAR.—A judgment in such action by a court having jurisdiction is a bar to any subsequent suit for the same cause of action; nor will any other than an appellate court inquire into the correctness of the judgment. The partner having authority to draw and negotiate the note, it cannot be said that the forged indorsement affects the rights of his co-partners. *Ib.*
4. CESTUI QUI TRUST BARRED.—The Bank, having sued in the name of the indorsee for its use, is substantially a party, and is within the rules that the judgment of a court of competent jurisdiction is final between the parties, and a bar to a subsequent suit. *Ib.*
5. DEATH BY NEGLIGENCE.—NOT NECESSARY TO SHOW PECUNIARY LOSS.—Under the statue of Illinois, of February 12, 1853, it is not necessary that the declaration should contain a special averment, showing the manner in which the next of kin have sustained pecuniary loss. *Barron vs. Illinois Central R. R. Co.*, 412.
6. SAME—The action can be sustained though the next of kin had no legal claim on the deceased for services or support. *Ib.*
   SAME.—The intent of the statute is not to deprive all persons of its benefits, except those who were dependent on the deceased; nor is it requisite in any case to prove present actual pecuniary loss. *Ib.*
7. An action cannot be maintained in this court against joint contractors where one of them resides in the same state with the plaintiff. *Lovejoy vs. Washburne*, 416.
8. If one is not served with process he may enter his appearance and join with the other in a plea to the jurisdiction, and the suit will be dismissed for want of jurisdiction. *Ib.*
9. ACTION FOR DAMAGES UNDER STATUTE.—Under the Illinois statute of February 12, 1853, an action can be maintained for the benefit of the next of kin, even though they may have had no legal claim on the deceased for support. It is not necesasry to prove actual pecuniary loss. *Barron vs. Illinois Central R. R. Co.*, 453.
10. WHEN NEXT OF KIN MAY SUE.—If the injured party would have had, by the common law, a right to sue if he had lived, then, if he dies, his representatives can maintain an action. The statute did not intend to give them a right of action in one section, and in the second render that right nugatory by depriving them of all damages. *Ib.*
11. USURY must be specially pleaded or specifically set forth in the record, and supported by evidence, or the court will not inquire into it. *Cleveland Ins. Co. vs. Reed*, 230.

PLEADING IN ADMIRALTY.

1. LIBEL—IN WHOSE NAME BROUGHT.—A libel may be brought either in the name of the shipper or of an insurance company which has paid the loss or accepted an abandonment. *The Keokuk*, 522.
2. ANSWER to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts. *The Propeller Sun*, 373.
3. ANSWER—WHEN SUFFICIENT.—An answer which sets up facts constituting negligence is sufficient, though no fault be formally charged. The rules of pleading in admiralty are less technical than at law. *The Pilot*, 159.

POLICY.—*See* INSURANCE.

POSSESSION AND PAYMENT OF TAXES.—*See* EVIDENCE, 3. FORECLOSURE, 5–7. STATUTE OF LIMITATIONS, 1, 2.

POSTMASTER.

Cannot open letter in mail. *United States vs. Eddy*, 227.

PRACTICE.—*See* ATTACHMENT—MANDAMUS, MARRIED WOMEN, NOTES AND BILLS, 18. REMOVAL FROM STATE COURTS.

PRINCIPAL AND AGENT.

1. ATTORNEY CANNOT ACQUIRE TITLE AS AGAINST PRINCIPAL.—Where an agent, by virtue of a power of attorney, conveys the property of his principal and takes a conveyance to himself, and then mortgages it, such use of the power of attorney would not give him the title as against his principal. *Cleveland Ins. Co. vs. Reed*, 180.
2. Though the principal might have repudiated the acts of his attorney, a purchaser under decrees of foreclosure of prior mortgages, being a stranger to the transaction, cannot object to the validity of the mortgage; but he can inquire into its true consideration. *Ib.*

PROOF OF LOSS.—*See* INSURANCE.

PROPELLER.—*See* COLLISION. *Also* ADMIRALTY.

PURCHASER.—*See* BONA FIDE PURCHASER.

RAILROADS.—*See* MUNICIPAL BONDS, NOTES AND BILLS, 6–10.

1.—DEATH BY NEGLIGENCE—NOT NECESSARY TO SHOW PECUNIARY LOSS.—Under the statute of Illinois, of February 12, 1853, it is not necessary that the declaration should contain a special averment, showing the manner in which the next of kin have sustained pecuniary loss. *Barron vs. Illinois Central R. R. Co.*, 412.
2. SAME.—The action can be sustained, though the next of kin had no legal claim on the deceased for service or support. *Ib.*
3. SAME.—The intent of the statute is not to deprive all persons of its benefits except those who were dependent on the deceased; nor is it requisite in any case to prove present actual pecuniary loss. *Ib.*
4. INTENT OF THE STATUTE TO MAKE CARRIERS CAREFUL, AND REMEDY DEFECTS IN COMMON LAW.—As against common carriers, the policy of the law was to make them more circumspect in regard to the lives intrusted to their care. At common law they were liable for personal inju

RAILROADS (*Continued.*)

ries resulting from their fault, but they escaped responsibility if death ensued; to remedy this evil, and provide a continuing responsibility, was the object of the law. *Ib.*

5. RULE OF DAMAGES.—There is no fixed measure of damages, nor any artifical rule by which they can be computed. The jury are in no case to take into consideration the pain suffered by the deceased, or the wounded feelings of surviving partners; but are to form their conclusions upon proof of all the circumstances attending the death, and of the relations existing between the deceased and the widow, or next of kin. *Ib.*

6. Decisions in New York, and of the Supreme Court of Illinois, commented upon. *Ib.*

7. ACTION FOR DAMAGES UNDER STATUTE.—Under the Illinois statute of February 12, 1853, an action can be maintained for the benefit of the next of kin, even though they may have had no legal claim on the deceased for support. It is not necessary to prove actual pecuniary loss. *Barron vs. Illinois Central R. R. Co.*, 453.

8. WHEN NEXT OF KIN MAY SUE.—If the injured party would have had, by the common law, a right to sue if he had lived, then, if he dies, his representatives can maintain an action. The statute did not intend to give them a right of action in one section, and in the second render that right nugatory by depriving them of all damages. *Ib.*

9. What circumstances the jury may consider. *Ib.*

10. RAILROAD COMPANY LIABLE FOR ALL TRAINS ON ITS TRACK.—If a railroad company allows the trains of another company to run over its track, as to passengers on its own trains it is responsible in the same manner as if all the the trains belonged to itself. *Ib.*

11. PASSENGERS ON FREGHT TRAINS.—A railroad company when it takes passengers as such on its freight trains, is under the same obligation to carry them safely as if they were on the regular passenger trains, but such travelers acquiesce in the usual incidents and conduct of a freight train managed by prudent and competent men. *Hazard vs. Chicago, Burlington and Quincy R. R. Co.*, 503.

It is immaterial how many such passengers the company carries, and whether they travel on special permits or regular tickets. *Ib.*

12. DUTY OF RAILROAD COMPANY.—A railroad company in the transport of passengers, though not the insurer of their lives, is required to use the utmost skill and diligence in carrying them safely, and to employ all those means peculiar to this mode of transit known to skillful and competent persons; but the passenger must have that care and regard for his own safety and security which devolves on a prudent man under the circumstances. *Ib.*

13. DUTY OF TRAVELER.—A passenger not rightfully in a certain position cannot complain of the absence of the proper safeguards. *Ib.*

14. Although an accident may have been the result of the negligence of the company's agents, still if a prudent man would not have been where and as the plaintiff was, he cannot recover. *Ib.*

RAILROADS (*Continued.*)

15. The effect of a former trial in the state court considered and stated. *Ib.*

16. NEW CERTIFICATES OF STOCK—WHEN NOT DIVIDENDS.—Where a railroad company, from time to time, made advances from their surplus earnings to another railroad company, taking leases and mortgages therefor, and such second company finally became insolvent, and the loaning company, to secure their debt, foreclosed their mortgages and purchased the insolvent road for the amount of their advances, and issued stock certificates to each of their stockholders, representing their *pro rata* interest in this property thus acquired—all the said advances having been made prior to the passage of the act of July 1, 1862—such certificates are not dividends within the meaning of section 81 of that act, and are not subject to the three per cent. tax. *Chicago, Burlington and Quincy R. R. Co. vs. Page* 461.

17. The advances having all been made prior to the passage of the act, and no money having been received at the sale, but the company having simply perfected their title and enforced a pre-existing lien, and having always treated this acquired property as added capital stock, such certificates are not properly dividends in money or scrip paid to the stockholders. *Ib.*

18. APPOINTMENT OF RECEIVER.—The appointment of a receiver of the property of a railroad company in the foreclosure of a mortgage, is not a matter of course, on default of payment of interest, but is a matter resting in the sound discretion of the court. *Williamson vs. New Albany, etc. R. R. Co.*, 198.

19. POWERS OF TRUSTEE—APPLICATION OF EARNINGS—POSSESSION—FORECLOSURE, ETC. *Ib.*

20. ASSIGNMENT OF RAILROAD REVENUES NOT TRANSFER OF CORPORATE PROPERTY.—An assignment of the revenues of a railroad, and of the use of the rolling stock of the company to a preferred creditor, is not a transfer of corporate entity or property. *Emigh vs. Chamberlain*, 367.

21. USE BY ASSIGNEE OF PATENTED BRAKES.—And the use, by the assignee, of cars which have patented brakes attached to them, does not render him liable to account for infringement of the patent, when the brakes have been licensed to the company by the patentee. *Ib.*

The assignee uses the brakes as an agent of the company, and not as a purchaser. *Ib.*

RECEIPT.—*See* BILL OF LADING, 1—9.

RECEIVER.

APPOINTMENT OF RECEIVER.—The appointment of a receiver of the property of a railroad company in the foreclosure of a mortgage, is not a matter of course, on default of payment of interest, but is a matter resting in the sound discretion of the court. *Williamson vs. New Albany, etc. R. R. Co.*, 198.

RECITALS IN BONDS.—*See* MUNICIPAL BONDS, 4—15.

REDEMPTION.—*See* FORECLOSURE.

FROM FORFEITURE OF STOCK.—*See* STOCK, 11—14.

RELEASE.

Plea setting up a release from a former administrator without showing that full payment was made is bad, it being a general principle that an administrator cannot release or compromise a debt, except upon full payment. *Maryland ex. rel. &c. vs. Todd*, 69.

REMOVAL FROM STATE COURTS.

1. SUITS MUST CONFORM TO RULES OF UNITED STATES COURTS.—Suits removed from the state courts into the courts of the United States are governed by the rules of the latter courts and must be made to conform substantially to the modes of procedure observed therein as in original cases. *Toucey vs. Bowen* 81.
2. But where the state has adopted a code, the plaintiff will not be held to any technical observance of the mere form of action. *Ib.*
3. The United States Circuit Court has no power to issue a writ of *mandamus* to a state court for the removal of a cause. Congress undoubtedly could give it such power, but it has not done so. *Hough vs. Western Transportation Co.*, 425.
4. CANNOT REVIEW DECISION OF STATE COURT.—Under the 12th section of the Judiciary Act of 1789, it is for the state court to decide the questions arising under the petition and this court cannot review its decision. *Ib.*
5. The remedy is by appeal to the Supreme Court of the state, and thence by writ of error to the United States Supreme Court. *Ib.*
6. The cases of The People *vs.* The Judges, &c., 2 Denio, 197, Spraggins *vs.* County Court, &c., Cooke, 160, disapproved. *Ib.*

REVENUE.

1. ACT OF FEBRUARY 18, 1793—HOW EXTENDED.—The act of March 2d, 1831, regulating the foreign and coasting trade on the Northern, North-eastern, and North-western frontiers, in effect extended the act of February 18, 1793, to the Western Lakes. *United States vs. Barney Sweeney*, 309.
2. REVENUE LAWS—WHAT VESSELS MUST OBSERVE.—Whenever a vessel was enrolled or licensed under this act of 1831, it became under the protection of the laws of the United States, and bound to observe the revenue laws. *Ib.*
3. DISTILLED SPIRITS—DUTIES REMOVED.—In the act of February 18, 1793, domestic distilled spirits are placed in the same category with articles of foreign growth or manufacture, they being at that time subject to tax, and the object of the act being the protection of the revenue. But by act of April 6, 1802, this tax on spirits having been discontinued, the object of the provisions of the act of February 18, 1793, so far as they relate to domestic distilled spirits is superseded, and the requirements of the act in regard to them are no longer to be enforced. *Ib.*
4. The distilling of liquors in the United States having been left entirely free of duty, the spirits became as free an article of commerce as any other article of domestic manufacture. *Ib.*

REVENUE (*Continued.*)

5. The fact that a cook and waiter smuggled on board a vessel at a Canadian port, a small quantity of distilled spirits, does not subject the vessel to forfeiture. *The Governor Cushman*, 490.
6. Though the spirits exceeded in quantity the amount allowed to seamen, and were brought on board in vessels different from those prescribed by law, yet as the officers of the vessel had no knowledge of it, and it formed no part of the cargo, it could not be exhibited in the manifest, and the vessel is not liable. *Ib.*
7. The fact that the captain and clerk had drank of these smuggled liquors, not knowing them to be such, does not alter the case. *Ib.*
8. A vessel is not liable to forfeiture for every apparent violation or breach of the revenue laws in regard to cargo; and this is such a case as may be accounted for and explained. *Ib.*

RIVERS.—*See* CONSTITUTIONAL LAW.

SALVAGE.

1. WHO ENTITLED TO—PRIOR TO OTHER LIENS.—Where the owners of a stranded vessel have abandoned all efforts to save her, and at their request a third party, at his own risk and expense, gets her off and repairs her, his claim is in the nature of salvage, and takes precedence of prior maritime liens. *The Barney Eaton*, 242.
2. MOTGAGEE MAY CLAIM SALVAGE.—The fact that the salvor held a mortgage upon the vessel not due, the mortgagors being the owners and in possession, does not deprive him of this preference. He cannot be considered in the light of an owner. *Ib.*

SEAMEN.

1. WHEN BOUND TO WORK ON SUNDAY.—Seamen on a vessel not in harbor, refusing to work on Sunday unless they are allowed double pay, which was not a part of their contract, but simply a custom of the port near which they happened to be, are guilty of disobedience, and may be discharged by the captain. *The Richard Matt*, 440.
2. The vessel being at anchor in a place where there was danger in case of a change of weather, the sailors had no more right to refuse to work than if they had been on the open lake. *Ib.*
3. In this case partial compensation was allowed, because of abuse by the captain. *Ib.*
4. ENTITLED TO MEDICAL CARE.—Sailors on the lakes are merchant seamen, and are entitled, in a proper case, to be cured at the expense of the vessel, if taken sick, or hurt without their fault, while in the service of the vessel. *The Ben Flint*, 562.
5. VESSEL NOT ALWAYS LIABLE.—When a sailor takes advantage of the rate of wages, before shipping on a short voyage on the lakes, and receives a hurt on entering the port of discharge, without any fault or neglect of the officers, and he takes his discharge and his full pay, and afterwards contracts a debt for medicine, etc., the vessel is not liable, the officers of the vessel not having neglected him after the injury. *Ib.*

SEAMEN (*Continued.*)

6. ADMIRALTY HAS JURISDICTION.—The Court in Admiralty has jurisdiction to enforce by libel the payment of the expenses of curing a sick seaman on the voyage. They are in the nature of additional wages. *Ib.* Numerous authorities cited and commented on. *Ib.*
7. NEGLIGENCE.—What constitutes negligence by officers or seamen. *Ib.*

SHIPPER. DUTY OF DISCLOSURE. *See* COMMON CARRIER, 3.

SMUGGLING. *See* REVENUE.

STATUTE OF LIMITATIONS.

1. FORECLOSURE SUIT—HOW BARRED.—A statutory limitation of ten years should be applied to a bill to foreclose filed seventeen years after the mortgage debt was due, the mortgagee having notice that the land had been sold under prior mortgages, and for taxes, and that the purchaser was in possession, claiming title. This is true, although the statute was passed subsequent to the maturity of the mortgage debt. *Cleveland Ins. Co. vs. Read*, 180.
2. Without such a statute equity would not disturb the possession or title of such a purchaser, he having been in possession fifteen years to the knowledge of the mortgagee. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity. *Ib.*
3. Cases under the statute of limitations cited and commented upon. *Ib.*
4. COMMON LAW LIMITATIONS REGARDED IN EQUITY.—Statutes for foreclosure and redemption are rules of property, and also laws of limitation; and in the absence of laws limiting proceedings in equity, the limitations as to similar demands at common law are considered as proper rules to be observed in courts of chancery. *Ib.*
5. IN MARYLAND RUNS AGAINST ABSENTEES.—Suit on an administrator's bond executed in the state of Maryland; plea that by the laws of Maryland no suit could be maintained on such a bond after the expiration or twelve years from the time it was executed. Replication that defendant removed from Maryland to Indiana before the twelve years had expired and before the suit was barred. Demurrer to this plea.
Held: There being no provision in the law of Maryland suspending the operation of the statute as to non-residents or absentees, the removal of the defendant made no difference. *Maryland ex. rel. &c. vs. Todd*, 69.
6. HOW ITS OPERATION SUSPENDED.—The operation of the statute, after it commences to run, can only be suspended by positive law, and if the time expires while the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right. *Ib.*
7. EFFECT OF INDIANA STATUTE.—The statute of Indiana on this subject, passed in 1852, gives full effect to the statutes of other states, and places debtors removing here in precisely the same condition in which they are placed by the law of the place which governed the contract. *Ib.*

STATUTES OF THE UNITED STATES.

The following statutes among others commented on and construed:

September 24, 1789. *The Flora*, 29; *Hill vs. Winne*, 275; *Hough vs. Western Transportation Company*, 425; *Hatch vs. Preston*, 19; *The N. W. Thomas*, 210; *Lovejoy vs. Washburne*, 416.
February 18, 1793. *United States vs. Barney Sweeney*, 309.
March 2, 1799. *The Governor Cushman*, 490.
April 19, 1806. *United States ex rel DeLoyne vs. Davidson*, 433; *Wetmore vs. Rice*, 237.
May 10, 1822. *The N. W. Thomas*, 210.
March 3, 1825. *United States vs. John Eddy*, 227.
March 31, 1830. *Wright vs. Shumway*, 23.
March 2, 1831. *United States vs. Barney Sweeney*, 309.
July 7, 1838. *The Seneca*, 371.
Bankrupt Law of 1841. *Barron vs. Newberry*, 149.
February 20, 1845. *The Flora*, 29; *The Pilot*, 159.
March 14, 1848. *North vs. McDonald*, 57.
August 30, 1852. *The Seneca*, 371; *The Propeller Sun*, 373.
July 1, 1862. *Chicago, Burlington & Quincy R. R. Co. vs. Page*, 461.
April 29, 1864. *The Gray Eagle*, 476.

STOCK.

1. FRAUDULENT ISSUE AND SALE OF STOCK.—The sale of stock in a railroad company by the directors at a less rate than the price fixed in the charter, is a fraud upon the law and the stockholders. *Sturges vs. Stetson*, 246.
2. CONVERTIBLE BOND—WHEN MAY BE REDUCED.—The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void. Stock thus taken is, in the hands of a party with notice, subject to the right of prior subscribers to have it reduced to the charter value of the shares. *Ib.*
3. STOCK—HOW CREATED.—Stock can be created only by contract—there must be an agreement to take it. *Ib.*
4. POWER OF DIRECTORS.—A power given to the directors by the charter to sell the property of the company or notes and bonds belonging to it does not apply to the capital stock, nor does the power to determine the time and terms of subscriptions for payment of stock have any reference to its price. *Ib.*
5. The case is different in principle from the sale of stock on execution or under the charter on default of payment, in which case the gain or loss is that of the delinquent stockholder, the other stockholders not being in any way affected. *Ib.*
6. It is not necessary that the charter contain a prohibition against taking subscriptions at less than the charter price. *Ib.*
7. FRAUDULENT ISSUE—WHEN A DEFENSE.—Although to an innocent holder the company would be liable for stock thus issued, these facts constitute a good defense to an action upon an executory contract for the purchase of such stock. *Ib.*

STOCK (*Continued.*)

8. FRAUDULENT STOCK—WHEN PURCHASER MAY RECOVER MONEY PAID.—A purchaser of stock illegally issued by the directors of a railroad company at less than the charter price may rescind his contract and recover from his vendor who participated in the illegal issue of the stock the money paid for his stock. *Fosdick vs. Sturges*, 255.

9. The issue of the stock having been a fraud upon the law and the stockholders, the purchaser, although the stock has been regularly transferred to him upon the books of the company, and there was nothing in the transactions as to him to awaken his suspicion, may elect his remedy, and is not bound to remain content with the stock transferred to him. *Ib.*

10. WHEN STOCK MAY BE REDUCED—AND HOW.—A large amount of stock having been thus fraudulently issued, the prior stockholders being entitled to reduce it, in the hands of parties with notice, to the amount actually paid for, the fraud in which the vendor participated is material in its effects upon the rights of the purchaser. *Ib.*

11. FORFEITURE OF STOCK—HOW MADE.—The provision in the articles of agreement of a private joint-stock company, that upon default by a stockholder of payment of assessments, all his shares, right and interest in the association and its property shall be forfeited, does not authorize the trustees by a naked declaration to make a forfeiture against which a court of equity will not grant relief. *Walker vs. Ogden*, 287.

12. REDEMPTION—WHEN ALLOWED.—The fact that the complainant with the acquiescence of the trustees, gave security for the payment of his assessments already overdue is of material assistance in entitling him to redeem. *Ib.*

13. Upon payment of the amount due, principal and interest, such a stockholder will be allowed to redeem, and the trustees will be ordered to make and deliver the proper certificates of stock. *Ib.*

14. *It seems* that where the articles of agreement do not provide an express mode in which stock is to be forfeited, a valid foreclosure cannot be made without the decree of a court of equity. *Ib.*

STOCKHOLDERS.—*See* STOCK.

1. INDIANA BANKING ACT—WHEN STOCKHOLDERS MAY BE SUED.—Under the act of the legislature of Indiana, of May 28, 1852, "to authorize and regulate the business of general banking," and the act of March, 1855, amendatory thereto, no suit can be maintained against a stockholder in any such bank in his individual character for the payment of any portion of the regular notes issued by such bank and protested for non-payment, until it is shown that the stocks deposited with the auditor of state, to secure the redemption of the circulation are first exhausted, or that the bank is insolvent. *Toucy vs. Bowen*, 81.

STOWAGE.—*See* BILL OF LADING, 8–11.

SUNDAY.

When seamen bound to work. *The Richard Matt*, 440.

SUPERVISORS.—*See* MUNICIPAL BONDS.

TORT FEASORS. *See* CONTRIBUTION.

TRAVELER.—*See* RAILROADS.

TRINITY RULES.—*See* COLLISION, 4.

TRUSTEE.—POWERS OF TRUSTEE OF RAILROAD CO. *Williamson vs. New Albany R. R. Co.*, 198.

TUG AND TOW.—*See* COLLISION.

USAGE.

1. DELIVERY BY CARRIER MAY BE GOVERNED BY USAGE.—Long established, uniform, and well-known usage, as to the mode of delivery by a common carrier, may be said to enter into the contract between the parties, and become the measure of their rights and liabilities. *The Richmond*, 49.

USURY.

1. NOTE—WHEN USURIOUS.—The making a note payable at a place in which exchange sells at a premium does not constitute usury; nor does it render the note void in the hands of a bank whose charter prohibits the taking more than a certain rate of interest. An agreement that the difference of exchange should be added to the interest would be a device to cover usury, and render a note usurious: but on a note payable at such a place, without proof that such a note commanded a premium at the place where it was made, the court will not presume usury. The contingency of the rate of exchange at maturity of the note cannot be incorporated with the contract to make it usurious. *York Bank vs. Asbury*, 230.
2. USURY NOT CONTINGENT.—A contract not usurious at the time it is entered into cannot become so by any future contingency. The corrupt intent must be apparent on the face of the contract, or rather it must contain all the elements to make it usurious. *Ib.*
3. A mortgage on real estate in Michigan, executed to secure a note payable in New York with ten per cent. interest is valid under the laws of Michigan. *Fitch vs. Remer*, 337.
4. The contract is not a New York contract, and is not rendered usurious and void by the statute of that state, prohibiting the taking of more than seven per cent interest. *Ib.*
5. The securities bearing ten per cent. interest, a legal rate in Michigan, the court cannot presume, against the fact, that usury under the New York Statute was intended. *Ib.*
6. USURY.—Where a contract is simply for a loan of money, and the capital is to be returned at all events, any profit made or loss imposed upon the borrower in addition to the legal rate of interest, is usury, no matter what form or disguise it may assume. *Buttrick vs. Harris*, 442.
7. A promissory note made and payable in the city of Milwaukee with interest at the rate of twelve per cent. and exchange on Boston, not exceeding one per cent., is on its face usurious under the laws of Wisconsin, and the mere fact of the residence of the payee being in the State of Massachusetts, near Boston, is not evidence that the exchange was added for the accommodation of the maker. *Ib.*

USURY (*Continued.*)

8. ADDING EXCHANGE NOT NECESSARILY USURY.—*It seems*, however, that where an addition is made for the price of exchange, not for the loan or forbearance, but as compensation for accepting payment in a place less convenient or where money is less valuable, the contract may be lawful. *Ib.*

9. Usury must be specially pleaded or specifically set forth in the record, and supported by evidence, or the court will not inquire into it. *Cleveland Insurance Company vs. Reed*, 180.

VENDOR AND VENDEE.—*See* STOCK.

WAGER.—*See* CONTRACTS.

WAIVER.—*See* INSURANCE.

1. OF LIEN FOR DEMURRAGE.—If a master delivers a cargo, and receives the freight without an agreement on the part of the person receiving it that it is to be held subject to a lien for demurrage, the lien is waived, and a libel for demurrage cannot be sustained against the cargo. *Winslow vs.* 400 *Barrels of Salt*, 459.

2. The fact that the master stated that he should look to the cargo for the claim for demurrage, is not sufficient to sustain the lien. *Ib.*

WESTERN LAKES AND RIVERS.—*See* ADMIRALTY.

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